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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1316

2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS,
AND FRANK CORN, ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

Due Process Clause of the Fifth Amendment to the United States Constitution

No State shall deprive any person of life, liberty, or property without due process of law.

Chapter 19—Public Law 14

AN ACT AUTHORIZING THE CONSTRUCTION, REPAIR, AND PRESERVATION OF CERTAIN PUBLIC WORKS ON RIVERS AND HARBORS, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy—

(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachment shall be printed as a House or Senate document.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9(a) of the Reclamation Project Act of 1939 (53 Stat. 1187)[1] and subsection 3(a) of the Act of August 11, 1939 (53 Stat. 1418),[2] as amended, are hereby amended accordingly.

Sec. 2. The following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized in the interest of national security and the stabilization of employment, and shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided*, That no project herein authorized shall be appropriated for or constructed until six months after the termination of the present wars in which the United States is engaged unless the construction of such project has been recommended by an authorized defense agency and approved by the President as being necessary or desirable in the interest of the national defense and security, and the President has notified the Congress to that effect: *Provided further*, That penstocks or other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam herein authorized when approved by the Secretary of War upon the recommendation of the Chief of Engineers and of the Federal Power Commission, and such recommendations shall be based upon consideration of the proper utilization and conservation in the public interest of the resources of the region:

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[1] 43 U.S.C.A. § 485h.

[2] 16 U.S.C.A. § 590z-1.

* * * * *

The improvement of the Trinity River and tributaries, Texas, for navigation, flood control, and allied purposes is hereby approved and authorized in accordance with the reports contained in House Document Numbered 403, Seventy-seventh Congress;

* * * * *

Approved March 2, 1945

* * * * *

33 U.S.C. § 701

FLOOD CONTROL GENERALLY

Laws applicable to works of improvement relating to flood control. All the provisions of existing law relating to examinations and surveys and to works of improvement of rivers and harbors shall apply, so far as applicable to examinations and surveys and to works of improvement relating to flood control. And all expenditures of funds appropriated for works and projects relating to flood control shall be made in accordance with and subject to the law governing the disbursement and expenditure of funds appropriated for the improvement of rivers and harbors.

Examinations and surveys; details from Government departments; reports. All examinations and surveys of projects relating to flood control shall include a comprehensive study of the watershed or watersheds, and the report thereon in addition to any other matter upon which a report is required shall give such data as it may be practicable to secure in regard to (a) the extent and character of the area to be affected by the proposed improvement; (b) the probable effect upon any navigable water or waterway; (c) the possible economical development and utilization of water power; and (d) such other uses as may be properly related to or coordinated with the project. And the heads of the several departments of the Government may, in their discretion, and shall upon the request of the Secretary of the Army, detail representatives from their respective departments to assist the Engineers of the Army in the study and examination of such watersheds, to the end that duplication of work may be avoided and the various services of the Government economically coordinated therein: *Provided,* That all reports on preliminary examinations hereafter authorized, together with the report of the Board of Engineers for Rivers and Harbors thereon and the separate report of the representative of any other department, shall be submitted to the Secretary of the Army by the Chief of Engineers, with his recommendations, and shall be transmitted by the Secretary of the Army to the House of Representatives, and are ordered to be printed when so made.

Reports by Board of Engineers for Rivers and Harbors. In the consideration of all works and projects relating to flood control which may be submitted to the Board of Engineers for Rivers and Harbors for consideration and recommendation, said board shall, in addition to any other matters upon which it may be required to report, state its opinion as to (a) what Federal interest, if any, is involved in the proposed improvement; (b) what share of the expense, if any, should be borne by the United States; and (c) the advisability of adopting the project.

Aiding Committee on Public Works. All examinations and reports which may now be made by the Board of Engineers for Rivers and Harbors upon request of the Committee on Public Works relating to works or projects of navigation shall in like manner be made upon request of the Committee on Public Works on all works and projects relating to flood control.

Mar. 1, 1917, c. 144, § 3, 39 Stat. 950; Aug. 2, 1946, c. 753, Title I, § 121, 60 Stat. 822.

* * * * *

33 U.S.C. § 701b-8

SAME; SUBMISSION OF REPORT BY CHIEF OF ENGINEERS

It is declared to be the policy of the Congress that the following provisions shall be observed:

No project or any modification not authorized, of a project for flood control or rivers and harbors, shall be authorized by the Congress unless a report for such project or modification has been previously submitted by the Chief of Engineers, United States Army, in conformity with existing law.

Sept. 3, 1954, c. 1264, Title II, § 202, 68 Stat. 1256.

* * * * *

33 U.S.C. § 701m

INSUFFICIENT CONGRESSIONAL AUTHORIZATION; PREPARATIONS FOR AND MODIFICATION OF PROJECT

In any case where the total authorization for a project heretofore or hereafter authorized by Congress is not sufficient to complete plans that may have been made the Chief of Engineers is authorized in his discretion to plan and make expenditures on preparations for the project, such as the purchase of lands, easements, and rights-of-way; readjustments of roads, railroads, and other utilities; removal of towns, cemeteries, and dwellings from reservoir sites; and the construction of foundations. The Chief of Engineers is also authorized in his discretion to modify the plan for any dam or other work heretofore or hereafter authorized so that such dam or work will be smaller than originally planned with a view to completing a useful improvement within an authorization: *Provided,* That the smaller structure shall be located on the chosen site so that it will be feasible at some future time to enlarge the work in order to permit the full utilization of the site for all purposes of conservation such as flood control, navigation, reclamation, the development of hydroelectric power, and the abatement of pollution.

Aug. 18, 1941, c. 377, § 2, 55 Stat. 638.

* * * * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION No. 2025
TRACT No. B-108

UNITED STATES OF AMERICA
vs.
2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS
(S. W. RICHARDSON)

Opinion

This suit is one of several brought in this Court to condemn lands in Tarrant and Parker Counties, Texas in connection with the Benbrook Dam and Reservoir Project on the Clear Fork of the Trinity River[1] near the southwest outskirts of Fort Worth, Texas. Only Tract B-108 in this case and one other tract in another suit remain in issue. The owner of each such remaining tract[2] is urging the same grounds in contesting the right of the government to condemn a certain portion of his subject tract. By agreement of the parties the Court has severed the issue as to the amount of just compensation from that relating to the right to condemn; and the latter issue is the only one to be decided at this time. The dam has long since been completed and closed, and the reservoir formed thereby has been in operation for a number of years.

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[1] This is the name used in the Act of Congress authorizing the project. "Benbrook", "reservoir" and "project" will be used herein at times for brevity. The reservoir resulting from the dam is called "Benbrook Lake".

[2] S. W. Richardson, the owner of the subject tract (B-108) at the time this suit was filed, has died and his executors have been made parties defendant in his stead.

The landowner contests the right of the government to condemn the fee simple title to the 647 acres of Tract B-108 above the 697-1 contour line[3] because the taking is unauthorized by law and is therefore arbitrary and capricious for each of the following reasons: (1) The 647 acres were actually taken for recreational use, when that was not one of the purposes for which private property could be condemned under the statutes governing this project at the time of taking. (2) The Benbrook Dam and Reservoir as actually built was radically and materially changed from the one approved by Congress, without any legal authority for such changes, resulting in the effort to condemn the present 1207 acres out of the Richardson 2500 acre tract instead of the 48 acres that would have been required for the project as authorized by Congress. He contends that the declaration of taking vested the United States with only a defeasible title to the land in question, leaving the right in him as the landowner to contest the validity of the taking in this judicial proceeding.

The landowner has never contested the right to take the fee simple title to the 560 acres below contour line 697.1, or to take a flowage easement in the portion of Tract B-108 above that line. In fact, he has offered and stood ready from the early stages to give the government the 560 acres in fee, a flowage easement in the remaining 647 acres, and a waiver of any damages due to flooding, all without cost. The government has steadfastly insisted on the fee title to the entire tract, even though it has been satisfied with flowage easements above elevation 697.1 in other lands in the area.

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[3] References of this kind are to the ground elevation in feet above mean sea level. 697.1 is the five year flood frequency line.

The government contends that the Benbrook Dam and Reservoir was a project authorized by an Act of Congress; and that since the decisions of the Secretary of the Army as to the subject tract were within the scope of such Act, they are conclusive on the question of the purpose of taking. The government's position in that regard has not been consistent at all stages of the case. It has ebbed and flowed from conceding the right of judicial review to the present claim that it should be denied outright. In one place in its briefs,[4] it stated that, "[I]t is at least theoretically conceivable that a case of arbitrary, capricious or corrupt conduct might arise for judicial determination." That weakened to a "more or less" concession in another place where it said: "Some lower courts have, in dictum, asserted a limited power of judicial review, phrased in terms of determining whether the administrative official acted in 'bad faith' or 'arbitrarily or capriciously.' In truth, government counsel in earlier cases as here, have more or less conceded a limited exception, no doubt secure in the thought that no bad faith could be shown . . ."[5] The government now argues that a landowner in a condemnation case is helpless to question the use declared by the administrative officer making the determination, and that the courts are powerless to get at the truth and grant relief. It says that the only remedy for an unauthorized, arbitrary or capricious condemnation of private property is political rather than judicial.[6a] and that to hold otherwise "could be alarming to any administrator."[6b]

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[4] Memorandum in Opposition to Defendant's Motion Reurging Dismissal.

[5] Same memorandum as in footnote 4. One wonders where the feeling of security in this case comes from when he reads the statement of General Sturgis, Chief of Engineers, quoted shortly hereafter, about how embarrassing it would have been for the Secretary to have had to justify his certification of the public need for this taking.

In reply to the landowner's other contention, the government denies that the differences in the project as constructed and the one as originally authorized were substantial. It says that they were mere modifications permitted by the Act of Congress creating the project, and that they were at least impliedly authorized by subsequent appropriation acts.

The Court is of the opinion that the landowner's claims above set out are correct. The Benbrook project was authorized "for navigation, flood control, and allied purposes" by the River and Harbor Act of 1945 approved March 2, 1945 (Public Law 14 - 79th Congress, 59 Stat. 10). The construction, executive and administrative functions of this project have been at all pertinent times vested in the Engineer Corps, United States Army,[7] under the direction of the Secretary of the Army. As a practical matter, the Secretary had no knowledge of this project, and the Corps of Engineers made all the actual decisions from beginning to end. At the time of the taking of the subject tract, there was no authority to acquire land in connection with flood control projects for purely recreational purposes. That authority did not come until 1958. Prior to that time, lands acquired for congressionally authorized purposes in connection with these flood control projects were permitted by law to be used incidentally for recreational purposes. Act of December 22, 1944, 58 Stat. 887, 889, as amended July 24, 1946, 60 Stat. 642, 16 U. S. C. A., Sec. 460(d). The Corps of Engineers could not wait for legislative authority to condemn for recreational purposes. For several years prior to 1953, it followed the practice[8] of enlarging upon the amount of property it had authority to acquire for Flood control and other projects, so as to take land for purely recreational purposes.[9] The use stated was always one which was authorized by Congress. The practice was general, well established and in force at the time of the taking of the land here involved, but Secretary of the Army Pace apparently first learned about it when the landowner in this case sought to take his deposition on the purpose of the taking. To stop the practice, the Department of the Army adopted the "1953 Policy for Land Acquisition". That policy limited the amount of land to be taken in fee to those areas required up to the conservation pool level, to land within 300 feet from the edge of that pool or which would be within the five year flood frequency level, to land required for permanent structures and for operation of the project as required by law, and to land required to provide limited access to the reservoir by the public. A permanent flowage easement was the greatest estate that could be acquired above the five year flood frequency line.[10] The Department of Interior joined in that policy.

[6a] Same memorandum as in footnote 4.

[6b] Government's Memorandum in Support of Findings of Fact and Conclusions of Law.

[7] Hereinafter referred to as Corps of Engineers.

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[8] The Chief of Engineers called this a "field practice", and said it became "so extensive as to risk successful challenge by landowners in the courts."

[9] This policy was exposed in Investigation of the Corps of Engineers Civil Works Program by a Subcommittee of the Committee on Appropriations, House of Representatives, 82d Congress, First Session (1951), and in Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, Eighty-fifth Congress, First Session, on Army-Interior Reservoir Land Acquisition Policy (1957).

[10] By way of example only, the following is quoted from a letter of October 19, 1953 from Robert T. Stevens, the then Secretary of the Army, to the lawyer who was representing Richardson at that time, to show the effect of the application of such policy to Tract B-108:

> "Upon application of the policy to the taking of the Richardson land, it has been determined necessary to acquire fee title to approximately 560 acres lying below contour elevation 697.1. The remaining 38 acres is that land along the shore of the

The following quotation is taken from a statement made by General Sturgis in 1957 before the Subcommittee last named in footnote 9 in regard to the land acquisition practice of the Corps of Engineers before the adoption of the 1953 policy (p. 422):

> "That present practices on the liberal side to help fish and wild life and recreation, could and were being

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conservation pool which is subject to inundation at least once in each 5 years on the average. A flowage easement will be adequate in the remaining 597 acres of land lying between elevations 697.1 and 741.0. To operate the project for flood control, it will at times be necessary to store floodwaters in the easement area provided. Consequently, it is necessary that structures for human habitation be prohibited in the easement area. It is not proposed to acquire any interest in the land above contour elevation 741. Since the land bordering the conservation pool is extensive, it will be necessary that the Government acquire a right-of-way for road purposes across the easement area in order to perform necessary operation of maintenance activities in the fee area. This right-of-way, I am sure, can be one that will be mutually agreeable.

"It is very gratifying to me that the new policy reduces the amount of land required from Mr. Richardson to 560 acres from the 1,460 acres originally recommended. In my opinion, the 560 acres, computed on the criteria of the new policy, will serve the needs of the Government and at the same time permit Mr. Richardson to retain control of 900 acres originally proposed for condemnation.

"I sincerely hope that you and Mr. Richardson will feel that I have made not only a conscientious but also a wise determination of policy in regard to real estate acquisition. If so, I hope that the Richardson litigation may now be settled. I have no fear that the landowner's title and rights will be described so clearly that they will not be subject to some other interpretation in the future by the Corps of Engineers. I will welcome your reaction to this letter and the policy enclosed herewith."

(Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, Eighty-fifth Congress, First Session, on Army-Interior Reservoir Land Acquisition Policy, page 446.)

> challenged by individuals through the courts with consequent potential and actual embarrassment and resulting adverse publicity. For example, a former Secretary of the Army, Mr. Pace, had been called personally to appear in court to justify certain takings which, under law, he alone was responsible for determining. He managed to avoid appearing in this case until Secretary Stevens replaced him, *but it could have been very embarrassing to have justified his certification of the public need of all this particular taking.*" (Emphasis added).
>
> "The 1953 policy for land acquisition resulted from the fact that *there is no general authority for the Corps of Engineers to acquire land other than for basic project purposes (navigation, flood control, etc.) and access for the public.* Yet practice in taking land had, in the interest of *recreation* and fish and wild life, *which Congress had considered only to be incidental,* became so extensive as to risk successful challenge by land owners in the courts. In its responsibility to Congress for carrying out the law and its duty *to protect the Secretary of the Army from improper certification of public necessity for taking land for project purposes, the 1953 policy was essential in order to modify current field practices.*" (Emphasis added).

In this case, the Corps took the portion of the subject tract in question for purely recreational purposes when that was a use not authorized by law, and for many years did everything in its power to keep the facts from coming to light. Such a taking was in violation of the provision of the Fifth Amendment to the Constitution of the United States that no person shall be deprived of his property without due process of law. A matter of such grave and serious import cannot be given the brush-off treatment insisted upon by the government. The Courts are not powerless to get at the truth and to protect the landowner's rights in such a situation.

The Benbrook project is part of the flood control system on the Trinity River. The Clear Fork of the Trinity River is the smallest of the three main tributaries which form the Trinity itself. The other two are the West Fork of the Trinity River and the Elm Fork of the Trinity River. The Clear Fork flows into and becomes a part of the West Fork just north of the courthouse in Fort Worth. The West Fork then meets the Elm Fork at Dallas. The stream so formed is the Trinity River from Dallas to its mouth at the Gulf of Mexico near Liberty. The river and all its tributaries lie wholly within Texas. The Benbrook Dam on the Clear Fork is in Tarrant County, of which Fort Worth is the county seat. The Clear Fork has its source in the county adjoining Tarrant County on the north, only about fifty miles by direct line from Fort Worth. A navigation system on the Trinity River has been a subject of study by Congress for years, but it has never materialized.[11]

Study of flood control on the Trinity River in Texas began before 1920. Four preliminary examination reports submitted by the District Engineer to the Chief of Engineers between 1920 and 1935 brought no immediate results. The Flood Control Act approved June 22, 1936 (49 Stat. 1570) contained a provision authorizing and directing the Secretary of War "to cause preliminary examinations and surveys for *flood control*" (emphasis added) at a number of named localities, including the Trinity River in Texas. In compliance therewith the District Engineer submitted to the Chief of Engineers a preliminary report which was a revision of the four previous ones. Favorable consideration of that report by the Chief of Engineers and the Board of Engineers for Rivers and Harbors resulted in a decision that a survey for flood control be made in the area of Benbrook. Such a report, dated November 15, 1939, prepared by the District Engineer and approved in turn by the Division Engineer, the Chief of Engineers and the Board of Engineers for Rivers and Harbors, was transmitted to the Speaker of the House and became House Document 403—77th Congress, First Session (H.D. 403). Public Law 14—79th Congress authorized this project in conformity with H.D. 403. The legislation was an omnibus act which authorized many river, harbor and flood control projects over the nation. The following language of the statute was the authorization for the Benbrook Project:

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[11] Some of these matters are stated from the Court's judicial knowledge of the geographical features of the State. *Granville-Smith* v. *Granville-Smith*, 341 U.S. 1, 75, S.Ct. 553, 99 L.Ed. 773; *Hoefs* v. *Short*, 114 Tex. 501 273 SW 785, 40 A.L.R. 833; *Humphreys-Mexia Co.* v. *Arseneaux*, 116 Tex. 603, 297 SW 225, 53 A.L.R. 1147.

> "The improvement of the Trinity River and tributaries, Texas, for *navigation, flood control, and allied purposes* is hereby approved and authorized in accordance with the reports contained in House Document numbered 403, Seventy-Seventh Congress." (Emphasis added).

This legislation contained no authority to take land for recreational purposes.

Funds for the project were appropriated by the following legislation: Act of Congress approved July 31, 1947 (Public Law 296 - 80th Congress), Act approved June 25, 1948 (Public Law 782 - 80th Congress), Act approved October 13, 1949 (Public Law 355 - 81st Congress), and Act approved September 6, 1950 (Public Law 758 - 81st Congress).

The Benbrook project described in H. D. 403 and authorized by Public Law 14 called for a gated spillway dam to be located on the Clear Fork at river mile 11.3. The storage capacity of the reservoir in acre feet of water was to be dead storage, 603; conservation storage, 30,603; and controlled (combined conservation and flood control) storage, 208,850. The elevation of the spillway crest was 672 feet and the top of the dam was 702 feet. Approximately 6200 acres would have been required. The estimated cost of the land was $483,000.00 and the entire project, approximately $5,205,502.00.

The project as built bore little resemblance to the one authorized by Public Law 14. The dam is located 3.7 miles farther upstream from Fort Worth at river mile 15. It is an uncontrolled spillway type. The notch crest of the spillway is 710 feet, and the main spillway crest is 724 feet. The top of the dam is 747 feet. The storage capacity in acre feet of water stated by the Definite Project Report is dead storage, 17,750; conservation storage, 88,250 (including 15,570 for sedimentation); and controlled storage, 410,013. Over 13,000 acres were acquired at a cost of about $2,500,000.00. The complete cost of the project was well over $14,000,000.00.

After the necessary appropriations had been made by Congress, Secretary of the Army Pace signed three letters to the Attorney General in regard to the institution and conduct of condemnation proceedings to acquire land for this project. Those letters were dated July 10, 1950, October 20, 1950 and December 20, 1951, respectively. In each instance, the Secretary had received from the Corps of Engineers a proposed draft of the letter he was to sign and send to the Attorney General and some supporting documents such as maps, ownership lists and descriptions of the lands involved and the estates to be acquired therein. He had no other knowledge or information. His certifications of the purposes and public necessity for taking the lands and estates were not based on reasoned decisions. He merely accepted without question those decisions already made in each instance by the Corps of Engineers, and signed the instruments necessary to make them effective. The persons with the Corps of Engineers who had the most responsibility for making the recommendations on which the Secretary acted in matters relating to this project were: (1) Col. Woodrow Berge, Chief of Acquisition Division, Corps of Engineers, who had charge of acquiring lands necessary for projects under supervision of Corps. (2) Clare C. Casey, attorney in Real Estate Acquisition, Planning Division, Corps of Engineers, who recommended types of estates necessary to be taken in lands for projects under Corps. (3) Mark S. Gurnee, civil engineer serving the Chief, Operations Division of Civil Works of the Office, Chief of Engineers, U. S. Army, who made engineering recommendations on projects.

The office of the Chief of Engineers was in Washington and of the pertinent Division Engineer and District Engineer in Dallas and Galveston, respectively.

Pursuant to the request in the Secretary's letter of July 10, 1950, the Justice Department instituted the several suits necessary to acquire the estates in the lands described in the documents prepared by the Corps of Engineers which accompanied the letter.

The original complaint in this case, filed on July 28, 1950, stated that the lands described in the exhibit attached thereto were being condemned "pursuant to the provisions of the Act of Congress approved March 2, 1945 (Public Law 14—78th Congress), and other acts of Congress which are declaratory and amendatory", and that the purpose of the taking was "for use in connection with the construction and operation of the Benbrook Dam on the Clear Fork of the Trinity River." On the same day the suit was filed, Judge Davidson entered an order granting the United States the right to take immediate possession. On November 17, 1950, the Secretary filed a declaration of taking stating that the land sought to be condemned was "necessary adequately to provide for the construction and operation of Benbrook Dam and Reservoir on the Clear Fork of the Trinity River . . ." Judgment was entered on the declaration of taking shortly after it was filed decreeing the fee simple title to the lands involved in this case to be vested in the United States, subject to certain then existing easements for public roads, highways, railroads, public utilities and pipelines.

Tract B-108, as described in the original complaint, contained 1452 acres. An amendment to the complaint reduced the acreage to 1207, more or less. 560 of those acres lie below the 697.1 five year flood frequency line. Tract B-108 is carved out of a parent tract of about 2500 acres owned by Richardson at the time this litigation began. Only 48 acres out of the 2500 would have been taken under the project as authorized by Public Law 14. At various times after the enactment of that legislation and prior to the beginning of actual construction on the project, the Corps of Engineers had under consideration five different taking areas in the 2500 acre tract, requiring acreage of 1589, 1320, 1460, 1452 and 1207, respectively. Only the last two became involved in this case.

Within a short time after the suit was filed, the landowner had received information that the taking of part of his land was for recreational purposes, and discovery proceedings were begun to get the proof. In order to avoid the effect of the decision in *United States* v. *Meyer,* 7 Cir., 113 F. 2d 387 (1940), *cert. den.* 85 L.Ed. 459, the landowner had to show that the person who actually made the decisions relating to the taking was the Secretary himself, or some person or persons under him who were acting as his alter ego in the matter. Notice was given to take the deposition of the Secretary and interrogatories calculated to get all information and documents of the Department regarding the taking and the purpose thereof were served upon counsel for the government. No objection was made to such discovery at first. By asking for time to search for and get all the documents together, it was indicated that the government would comply with discovery. Government counsel did in fact, on more than one occasion, agree that it would. However, when the pertinent documents from the files of the Corps of

Engineers relating to this taking were assembled, counsel for the Department of Justice announced that they were changing their position and that the government would not submit to discovery. It was in reference to this effort to get the Secretary's testimony that General Sturgis made the statement to the congressional committee that "it could have been very embarrassing to have justified his certification of the public need of all this particular taking." The landowner filed a motion to dismiss, or in the alternative to abate the proceeding, and to restore the landowner to possession. Almost two years after this suit was filed Judge Davidson ended a long and patient struggle to get the government to comply with its discovery obligations by entering an order dated June 30, 1952, setting aside the previous orders for the government's immediate possession of the portion of Tract B-108 in question, returning the landowner to possession, and abating further proceedings as to such tract until the government complied with discovery. The government sought to set aside the order on direct appeal and by petition for writs of mandamus and prohibition filed in the Court of Appeals. That Court held that the order was not one from which an appeal could be taken. It said further that while it had the authority to set aside the order by mandamus, it would not do so. *United States* v. *Richardson,* 5 Cir., 204 F. 2d 552 (1953). The above matters are stated in summary fashion. The facts in regard to them are undisputed and are set out in detail in Judge Davidson's order of June 30, 1952, and in the opinion of the Court of Appeals. The following quotations from that opinion show the Court's reaction to the situation:

> ". . . It [the order of June 30, 1952] simply withdrew and suspended the judicial assistance which petitioner had invoked ex parte against appellee. Its purpose was to stay the proceeding until appellant complies with the discovery process, as it had expressly

> agreed to do so on February 11, 1952, when it invited the court to enter the order of February 28, 1952 . . ." 204 F. 2d, at 555.
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> ". . . The court in the exercise of its inherent powers and in an effort to insure that appellee be not denied due process merely granted a stay of proceedings the overall effect of which was to condition appellant's right to proceed in compliance with the discovery process . . ." 204 F. 2d, at 556.
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> ". . . The appellant contends that if a writ is not granted it is left without a remedy and that the power of review will be defeated. Further that the order for examination constituted not only an abuse of discretion but an error as to the scope of the court's authority under the rules. These contentions are clearly without merit because the alleged unfortunate predicament of appellant is of its own making and the effect of the stay order requiring compliance with the discovery process can be subsequently determined on appeal in the final judgment dispositive of the whole cause. We purposely refrain from expressing our opinion on the merits of the orders of the district court and are content to say that if the judge did commit error it was invited error. This record affirmatively shows that the petitioner induced the court below to make each of the successive orders which culminated in the order of June 30, 1952, on the representation that by pursuing the suggested course appellee would be entitled to receive the information he was seeking, and it follows that the petitioner may not now challenge the trial court's authority . . ." 204 F. 2d, at 556.

After the case had remained dormant under the stay order for ten more years following the decision of the Court of Appeals, time had wrought enough changes to bring it back to life. The officials who would have suffered embarrassment by exposure of the general practice of the Corps of Engineers of taking land for unauthorized purposes were gone. That practice had been made public in the congressional hearings heretofore mentioned. A new administration had taken office. The landowner's motion reurging his previous motion to dismiss for failure to comply with discovery brought matters to a head. Sometime thereafter, the government announced that it would be willing to submit to discovery, and it did give the Court the impression of cooperating thereafter. While discovery progressed slowly due to the natural obstacles that resulted from the years of dormancy, it was finally completed as well as could be expected under the circumstances.

The matters relating to the discovery problems are reviewed only for the value they have on the issue of the purpose of the taking.[12] The Court draws the inference from these facts that the government was withholding evidence in its possession because it would show that recreational use was the real purpose of the taking.[13]

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[12] There are much more important matters to be determined now than fixing the blame for the delay. While in the natural course of things the case would have been disposed of years ago if it had not been for thirteen years impasse resulting from the government's refusal to submit to discovery, there has been delay since the government's change of position that cannot be charged to it. At one time it appeared that negotiations for settlement would bring the case to a close. Then followed a long period of illness of leading counsel for the landowner which turned out to be terminal. After his death, time had to be granted new counsel to become familiar with the case. Discovery took longer on account of the passage of time. Finally, a substantial delay has been due to a docket which has prevented the Court from taking out the several weeks necessary to study the voluminous record, including congressional proceedings of which the government has asked it to take judicial notice and the authorities on the difficult legal questions here involved, and then to organize the case in such fashion that it could be put on paper within reasonable limits.

The facts developed by discovery show what General Sturgis meant in his statement to the congressional committee when he referred to "field practices" of the Corps of Engineers which brought about "improper certification of public necessity for taking land for project purposes." Almost simultaneously with the authorization in 1945 the project which had been recommended by the Corps as more than adequate for navigation, flood control and allied purposes, the Corps, in line with its "practices on the liberal side to help . . . recreation", was preparing plans to take more than twice as much land as had been authorized, and much of that excess was for purely recreational purposes. Those plans contemplated construction of parks, permanent recreation facilities for day-time use and for camps, of cottages and tourist accommodations, and of concessions to be leased out. Elaborate maps were prepared showing the proposed location of these facilities. The portion of Tract B-108 in question was recognized as being ideally suited for recreational purposes. It was hilly almost from the edge of the lake, and the high bluffs overlooking the water were ideal building sites. A substantial part of the planned recreational facilities were intended to be on the excess land in Tract B-108 above the five year flood frequency line. The final recreation plans for the project were in the form of Appendix VIII E to the Definite Project Report prepared after the passage of Public Law 14.

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[13] Withholding or failure to produce important evidence within the peculiar control of a party raises the inference that such evidence would be unfavorable to that party's cause. *Kirby* v. *Talmadge,* 100 U.S. 379, 383, 16 S.Ct. 349, 40 L.Ed. 463 (1895); *Foust* v. *Munson S. S. Lines,* 299 U.S. 77, 86, 57 S.Ct. 90 81 L.Ed. 49 (1936); *Interstate Circuit* v. *United States,* 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610 (1939); *Ford* v. *United States,* 5 Cir., 210 F. 2d 313, 317 (1954); *United States* v. *Johnson,* 5 Cir., 288 F. 2d 40, 45 (1961).

As would be expected, the Corps did not make public that recreational use was the controlling factor in taking acreage in excess of that needed for the authorized purposes of the project. In a preliminary draft of cost estimates, certain proposed expenses were designated as being "for recreation". In the draft that was made public, that was changed to "preparation of master plan." There was a change of a similar nature in regard to the specified use of areas on the maps. At first, some of the lands were designated as "recreational areas", but that became "reservoir management" on the final plans. In addition, Appendix VIII E to the Definite Project Report was stamped "Not for Public Release". It was the only appendix so classified. It was withheld in the files of the Corps when the Definite Project Report with all its other appendices were made public. As an apparent justification for taking this large amount of excess land for unauthorized purpose, the Corps came up with a preposterous hypothetical storm that had no justification whatever.

The survey report of the Corps of Engineers which appears in H.D. 403 states that relatively very low rates of discharge per square mile obtain along the Trinity River throughout its entire course from Fort Worth to Galveston Bay, due in part to the shape and slope of the watershed and to climatological conditions which do not favor concentrated rainfalls over extensive areas on the watershed. The Clear Fork has a particularly small watershed of only 508 square miles. The stream itself is short, and there is not much drainage area on either side of it. Since it is only about 50 miles long, a watershed averaging about 10 miles in width would account for the entire 508 square miles.

A United States Weather Bureau was first established in Fort Worth in 1949, and records of precipitation in the Fort Worth area[14] have been kept for a number of years. The average annual rainfall in the Clear Fork watershed is less than 32 inches. The maximum 24 hour rainfall recorded at Fort Worth was 9.57 inches on September 3-4, 1922. Storms of that kind are very rare in the area. The highest flood on the Clear Fork resulted from 12.57 inches of rain over a five day period, April 23-28, 1922. However, the spillway specified in H.D. 403 was patterned after a rainstorm of much greater intensity at Ennis, Texas some sixty miles southwest of Benbrook Dam. That storm in September, 1936, produced 14.70 inches of rain over a three day period at the center of the storm. The average over an area comparable to the Benbrook watershed was 13.25 inches. 19.87 inches, a figure representing approximately 150% of the 13.25 inches, was decided upon as an estimate of the worst possible storm which might occur over the Benbrook watershed in a 54 hour period. The dam so described in H.D. 403, patterned after such a hypothetical storm, would have created a reservoir capable of handling three times the volume of the maximum flood ever actually experienced on the Benbrook watershed. H.D. 403 said that, "The flood-control plan presented in this report is designed to . . . provide full flood proetction to the leveed portions of the cities of Dallas and Fort Worth against the probable maximum flood." While this calculation provided adequate land for the basic project purposes, the Corps saw some excess land ideally suited for recreational purposes and set out to get it by the use of a hypothetical storm, the like of which has never been known in Texas.

Less than one month after the Benbrook project was authorized, the Corps of Engineers began assembling data for the hypothetical storm it used for determining the spillway height and the taking line for the project as later built. It considered a number of storms 150 to 200 miles nearer the Gulf of Mexico, most of which occurred during the hurricane season in the Gulf, and which were triggered by the Balcones Escarpment and the Edwards Plateau. The Edwards Plateau, which is the hilly section and table land northwest of San Antonio and Austin, is more than 150 miles, at its nearest point, from the Benbrook watershed. The Balcones Escarpment may be traced from Del Rio to Austin and to Waco, where it diffuses. No pronounced escarpment is visible within 90 miles from the Benbrook watershed. Wind currents forced upward sharply by these Balcones and Edwards escarpments bring moisture laden clouds in sudden conflict with cooler air, and heavy rainfall results. Also, the rainfall is heavier within 150 to 200 miles of the Gulf than it is in the Fort Worth area. The tropical hurricane storms entering Texas from the Gulf dissipate rapidly as they go inland, just as they do in all the coastal states. By using these storms and enlarging upon them, the Corps came up with a hypothetical storm of 28.2 inches of rain over a sixty hour period, even though the average annual rainfall on the Benbrook watershed is only 31.3 inches and the greatest storm of record there was the 12.57 inches over a 57 hour period. That record breaking hypothetical storm was the one used for the spillway design on the dam as built.

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[14] References of this kind to the "Fort Worth area" will include the Clear Fork watershed, as it is in the immediate vicinity of Fort Worth and has substantially the same precipitation.

The particular storm used as a basis for the hypothetical spillway design storm was the one which occurred along the Balcones Escarpment near Thrall, Texas in September, 1921. Thrall is about 30 miles northeast of Austin, and around 130 miles from the Gulf. It is over 150 miles from Benbrook. The amount of rain which fell there is uncertain, as it has been increased substantially in recent years on the basis of unofficial observations. In all probability, it was about 18 or 19 inches over a period of three days. Based upon rainstorm in areas distant from Fort Worth, much nearer the Gulf, and having orographic barriers non-existent in the Benbrook watershed and entirely different climatological conditions, the Corps came up with this hypothetical storm of 28.2 inches of rain over a 60 hour period. It was transported to the Benbrook watershed for spillway design purposes, even though the greatest storm of record there had been 12.57 inches over a 57 hour period and the entire average rainfall for a whole year was only 31.3 inches.

The Division Engineer of the Corps, whose headquarters at Dallas were only 40 miles east of Benbrook, was highly critical of this hypothetical storm criteria in his comments to the Chief Engineers. He pointed out that the volume of rainfall during the Thrall storm had been greatly increased on the basis of unofficial information gathered years after it occurred, and that the revised rainfall estimate exceeded the world record for precipitation for periods of 2 to 18 hours. He pointed out that Thrall was 150 miles nearer the Gulf than Fort Worth and was on the Balcones Escarpment. He commented that the hydrological study was very theoretical, and that care should be taken about transposing it to the Benbrook watershed. He concluded that "it is believed that this storm should be materially reduced if used as a basis for spillway design in the upper Trinity River basin . . . where storms would not be affected by topographic features such as the Balcones Escarpment."

The policy group in the Corps ignored the Division Engineer's advice and proceeded with the hypothetical 28.2 inch storm. Even that, however, record breaking as it was, did not justify the height of the spillway necessary to get the land the Corps wanted for recreational purposes. That shortcoming was met by assuming that the reservoir was filled to capacity when the 28.2 inch storm began, on account of another big storm and their inability to open the dam gates.[14a] That was the kind of design criteria that the Corps used to establish the 741 foot take line. There was no justification in fact or in reason for such criteria.

That the land was never necessary for the project is shown by the fact that the witnesses from the Corps of Engineers admitted in their testimony that the possession and control of it by the landowner since the order of June 30, 1952, has not hampered or interfered with the operation of the dam or reservoir.

The landowner has had the title to 647 acres of land taken away from him as the result of two unauthorized actions of the Corps of Engineers and either one of them, standing alone, is sufficient basis for invalidating the taking.

The Court has been unable to find any case where land has been wrongfully taken as a result of radical unauthorized changes in a project. It is fundamental, however, that a condemning agency can take a person's land only when it has legal authority to do so. The project as built was entirely different from the one which was authorized by Public Law 14. The modifications were too significant and radical to come within the authority granted by the Statute. The following is quoted from 33 U.S.C.A., Sec. 701b-8:

> "It is declared to be the policy of Congress that the following provisions shall be observed:
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> "No project or any modification not authorized, of a project for flood control or rivers and harbors, shall

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[14a] None of the hypothetical storm spillway design criteria made any allowance for the well established reservoir management practice of lowering the level of the water during potential flood months. The only large floods in the Fort Worth area have occurred in the months of April, May and September.

be authorized by the Congress *unless a report for such project or modification has been previously submitted by the Chief of Engineers,* United States Army, in conformity with existing law." (Emphasis added.)

33 U.S.C.A., Sec. 701m provides that the Chief of Engineers is "authorized in his discretion to modify the plan for any dam or other work heretofore or hereafter authorized so that such dam or work will be smaller than originally planned with a view of completing a useful improvement within an authorization . . ." Congress has some protection in that kind of modification, but it is difficult to see how a much larger dam could be completed within an authorization. The statute also imposes the further restriction that the modified dam "shall be located on the chosen site." The one in this case was almost four miles from the authorized site. This is answer enough to the government's claim that the subsequent granting of appropriations for the project impliedly authorized the project as built, but there is more. The various appropriations acts heretofore cited provide that the money granted is for projects "heretofore authorized", and expressly state that "no part of this appropriation shall be expended for any preliminary examination survey, project or estimate not authorized by law." Exhibits offered in evidence, as well as the testimony of the government's witness, Gurnee, of the Corps of Engineers, show that it was not the intention of the Corps to direct the attention of Congress to the modifications. If Congress had considered that it was being properly advised on the way the Corps was handling these projects, there would have been no occasion for the proceeding known as, "Investigation of the Corps of Engineers Civil Works Program by a Subcommittee of the Committee on Appropriations, House of Representatives, 82d Congress, First Session." One of the fundamental purposes of that investigation was to determine why the cost of the projects was always so much greater than the estimate given to

get authority for the project.[15] The Corps claimed it was due to the general rise in prices. The subcommittee found that over 30% of the increase could not be justified on that basis. The statistics in the report show that most of that 30% was the result of modifications which substantially increased the size of the project.

The cases on this matter of implied authority are scarce, probably because so few people would have a right to bring a judicial action raising the question. Maiatico v. United States, App. D.C. 302 F. 2d 880 (1962), is most nearly in point. In that case, the government sought to condemn certain property in the District of Columbia. The Administrator of General Services was the administrative officer who made the determination for the necessity of taking and who filed the declaration of taking. The landowner successfully contested the condemnation on the ground that the necessary authority for the taking did not exist. The government argued that it has express authority, and in the alternative that authority had been impliedly given under the act making appropriations for the General Services Administration. In rejecting such contentions, the Court of Appeals said at pp. 885-886:

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[15] The subcommittee found that one of the reasons flood control projects had been costing so much more than anticipated by Congress was that the reports of the Corps of Engineers to the Appropriations Committee after the projects were once authorized were inadequate to keep the Appropriations Committee informed. The importance of having the full information at the right time is emphasized in the following quotation from the Report of August 16, 1951 from the Subcommittee on Deficiencies and Army Civil Functions to the Committee on Appropriations, House of Representatives, Eighty-second Congress, First Session, in the Investigation of the Corps of Engineers Civil Works Program:

> "Even worse from the national standpoint is the fact that the $800 million increase, if known to Congress in whole or in part when initial construction funds were appropriated, would have weighed heavily in the action which Congress took then. That was the hour of decision. At that time the economic justification for many projects hung in delicate balance. Any reported cost increase would have had a profound effect on the crucial congressional decision of whether to initiate construction. Undoubtedly, some of the 182 projects would not be under construction today if Congress had had reliable information from the Corps of Engineers, developed by competent engineering planning."

> "The Government would have us say that the general provision of the Second Supplemental Appropriation Act supplants the limitations of the Public Buildings Act of 1959 and the Appropriation Act which had so carefully been linked to the former. Carried to its logical conclusion, the Government's construction would sweep away all pre-existing requirements. Any such inversion of the purpose of Congress would be in direct conflict with the governing principle to be applied here. 'However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling." Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 [52 S.Ct. 322, 76 L.Ed. 704]'."

Since the project as built was so grossly beyond the limits of the project created by Public Law 14, there was no authority to acquire the land sought to satisfy the radically excessive modifications.

The 48 acres of Richardson land required by the project created by Public Law 12 does not lie within the 647 acres of Tract B-108 now in question. The claimed necessity for the taking of such 647 acres arose from the construction of a project so totally different from the one contemplated by the statute that it amounted to an unauthorized project. The taking of the portion of Tract B-108 here in question was therefore invalid for lack of authority. Maiatico v. United States, supra.

The government's fears of dire results generally from such a holding are not justified. It will not have to abandon the project and return all heretofore acquired land to the former owners. Nichols on Eminent Domain, 2d Ed. Sec. 35.[16]

The taking is also invalid because it was for a purpose not permitted by statute. This is a recognized ground for contesting the right of the government to condemn. Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945); Maiatico v. United States, supra. The landowner in the Catlin case contested the authority for the taking, and appealed from the order on the declaration of taking. The Supreme Court held that the order was not an appealable one, but recognized that the landowner still had the right to contest the authority for taking. The following quotation from the opinion shows that the Court repeatedly recognized the owner's right to challenge the taking on the ground that it was for a purpose beyond statutory limits:

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[16] The following is quoted from the text cited:

> "The constitutional provisions which affect the exercise of the power of eminent domain are not intended as abstract limitations upon the power of the government so that any statute which violates such provisions is necessarily and for all purposes void, and the acts of any public officials thereunder are necessarily illegal. On the contrary, the provisions were intended solely for the protection of the individual property owner from the aggressions of the government in concrete cases. It necessarily follows that, so far as the limitations upon the power of eminent domain are concerned, no one but the owner of property whose constitutional rights are violated can object to the validity of a statute on the grounds that it authorizes the exercise of eminent domain in a manner forbidden by the constitution, and if, when property is taken under an unconstitutional statute, the owner sees fit to waive his right to object, no one else has any ground to complaint, and the taking is as effective to pass the title to the property as if all the requirements of the constitution had been complied with. Such waiver may be by parol, or it may be implied from the owner's acceptance of the compensation. However, an owner, by merely filing a claim for damages is not estopped from contesting the constitutionality of the taking."

> "The exact effect of these provisions is not entirely clear. But we find nothing in the statute to indicate that Congress intended to deprive the owner of all opportunity to *challenge the validity of the taking for departure from statutory limits* . . ." 324 U.S., at 240.
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> "We think the purpose was to leave the owner's remedy existing before the statute was adopted . . ." 324 U.S., at 240.
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> "While the language and the wording of the act are not wholly free from doubt, we see no necessary inconsistency between the provisions for transfer of title upon filing of the declaration and making of the deposit and at the same time preserving the owner's preexisting right to question the validity of the taking as not being for a purpose authorized by the statute under which the main proceeding is brought. That result may be reached if the statute is construed to confer upon the government, upon occurrence of the events specified, only a defeasible title in cases where an issue concerning the validity of the taking arises . . . The alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity or one for which the only remedy would be to accept the compensation which would be just if the taking were valid, would raise serious question concerning the statute's validity . . ." 324 U.S., at 241.

In the Maiatico case, the Court said at p. 886:

> "Nothing we have said is in derogation of the vast and admitted power of the Government for its own sovereign purposes to appropriate private property,

> so long as the owner is awarded 'that just compensation which the Constitution required.' Despite appellants' allegations that the taking is unnecessary, it is not for us to determine whether or not a particular project be desirable. That is within the power of the Congress, however, subject to the right of the owners 'to challenge the validity of the taking for departure from the statutory limits.' "

Bishop v. United States, 5 Cir., 288 F. 2d 525, 527, 528 (1961), citing the *Catlin* case, says that the Declaration of Taking Act is a statute "which has constitutional overtones, and is to be read in that light", and that it "could not have been intended to whittle down the property owner's rights."

The government makes no argument against the rule that a landowner can challenge the validity of a taking "for departure from the statutory limits." The *Catlin* case is cited with no indication of disapproval in Berman v. Parker, 348 U.S. 26, 36, 75 S.Ct. 98, 99 L.Ed. 27 (1954), the authority most heavily relied upon by the government. The question here is whether the courts have the power to get at the truth if the administrative office making the determination does not admit that the taking is for a purpose beyond statutory limits. The government argues that the administrative officer's statement of the purpose of the taking is conclusive on the landowner, regardless of what the truth is.

The general rule is that the declaration of taking of the proper administrative officer is not subject to judicial review. Oakland v. United States, 9 Cir., 124 F. 2d 959 (1942), cert. den. 316 U.S. 679; United States v. 242.22 Acres of Land, 2 Cir., 129 F. 2d 678 (1942), cert. den. 317 U.S. 698; United States v. Montana, 9 Cir., 134 F. 2d 194 (1943), cert. den. 319 U.S. 772. There are however, a number of cases, state and federal, which recognize that while the scope of review is limited, it exists where the action of the official issuing the declaration acted arbitrarily, capriciously or fraudulently.[17] United States v. Carmack, 329 U.S. 230, 67 S.Ct. 252, 91 L.Ed. 209 (1946); McKendry v. United States, 9 Cir., 219 F. 2d 357 (1955); Eden Park v. United States, 9 Cir., 300 F. 2d 432 (1962); United States v. 91.67 Acres of Land, 4 Cir., 334 F. 2d 229 (1964) State Road Department of Florida v. Southland, Inc., Flas., 117 So. 2d 512; Trustees of Schools v. Sherman Heights Corp., Ill., 169 N.E. 2d 800; County Board of School Trustees of Marion County v. Batchelder, Ill., 130 N.E. 2d 175; Dahl v. North Ind. Pub. Ser. Co., Ind., 157 N.E. 2d 194; Mock v. Sioux City, Ia., 60 N.W. 2d 92; Board of Commissioners of Teusas Basin Levee Dist. v. Franklin, La., 54 So. 2d 125; State Roads Commission v. Franklin, Md., 95 A. 2d 99; City of Greewood v. Guinn, Miss., 121 So. 2d 160; Aeroville Corp. v. Lincoln Co. Power Dist., Nev., 290 P 2d 970; Bergen Co. v. S. Goldberg & Co., Inc., N. J., 185 A. 2d 38; Saso v. State of New York, 194 N.Y.S. 2d 789; Jones v. Village of Muence, Ohio, 152 N.E. 765; Roosevelt Hotel Building Co. v. City of Cleveland, Ohio, 155 N.E. 233; Port of Amatilla v. Richmond, Or., 321 P. 2d 335; Bookhart v. Central Electric Power Co-op., S.C. 72 S.E. 576.[18] If judicial review exists for those purposes, there is no question that it does for takings which are departures from statutory authority. The government relies upon Berman v. Parker, supra, and a number of cases, by the Courts of Appeals along the same line. In each one of those cases, the taking was for a lawful purpose and the landowner was challenging the administrative official's determination on one or more of the grounds that the taking was unwise, not desirable, inexpedient, or the product of poor judgment or careless planning. The purpose of the taking was lawful, and the landowner was asking the court to review of the judgment of the official. Those cases presented an entirely different question from the one posed here where the truth was that the taking was a departure from statutory authority.

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[17] The government has devoted a good portion of its briefs to the discussion of whether the Court has to find that the parties making the decisions in this case were guilty of fraud. The Court deems it unnecessary to decide whether the officials acted maliciously. It could be that subjectively they had what they considered lofty motives in taking the excess Richardson land for recreational use by the public, just as a policeman might consider that his search for the truth would justify coercion from an accused in his custody. Regardless of what their motives were, they were taking private property from people for purposes they knew were not authorized by law. In so doing, they were violating their constitutional rights under the Fifth Amendment.

[18] Federal cases control in condemnation suits in the federal courts. The state cases are cited to show the widespread recognition of the exception to the general rule that administrative determinations on taking are not subject to judicial review.

The Fifth Amendment to the Constitution of the United States guarantees that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." Under that guaranty, the land here in issue was Richardson's to enjoy until he chose to dispose of it voluntarily or until he was divested of it for a purpose and in the manner provided by law. The unauthorized taking of his property was a violation of his rights under this due process clause. United States v. Carmack, supra;[19] Swan Lake Hunting Club v. United States, 5 Cir., 381 F. 2d 238 (1967, citing O'Neill v. Leaner, 239 U.S. 244, 36 S.Ct. 54, 60 L.Ed. 249. The government cannot dispute that the landowner here has the due process guaranty. It says that the Secretary's certification of the purpose of the taking is conclusive and that therefore the question of the legality of the taking cannot be reached. This due process guaranty would be a hollow one, indeed, if it could be defeated by the impenetrability of a paper shield. The federal courts have not let record or documentary certifications prevent them from getting at the truth to determine whether the other two due process guaranties were being violated. There is no reason why the rule should be any different where it is property rather than life or liberty, as it is the obvious purpose of the Constitution to set up the fundamental safeguard of due process for all three as a bulwark against oppression. It is fundamental that the power of eminent domain is a necessary attribute of sovereignty, but it is an awesome power which should be exercised only within the framework of the law. It is for Congress, not the Corps of Engineers, to decide the purposes for which private property can be taken under eminent domain. Such a process assures that the decision will be made publicly, by elected representatives of the people, after an opportunity to be heard, instead of secretly, as was done by the Corps here, with the potentially revealing documents marked "Not for Public Release." To say that there can be no inquiry as to the truth of the certification of the purpose of the taking would encourage abuse of the power of eminent domai~~n. It may well~~ be that the Corps felt that it had this protection, and that such feeling was responsible for the admitted widespread proportions of their unauthorized land acquisition practice.

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[19] ". . . The Fifth Amendment, in turn, provides him with important protection against abuse of power of eminent domain by the Federal Government." 329 U.S., at 236-237, 91 L.Ed. at 214.

The rule announced in the cases cited severely restricting inquiry into the administrative officer's determination of the purpose of a taking do not reach the question at issue here. They do not say that an inquiry cannot be made as to the correctness of the certification of the purpose. The effect of the holdings in those cases is that where the actual purpose of the taking is correctly certified, and the purpose is one authorized by law, the determination to take cannot be challenged. That is not the case here. The Secretary certified that the land was being taken for the basic project purposes of flood control and navigation, when the real purpose was recreation. Even though the Secretary made the erroneous certification innocently, it was tainted by the excesses of the Corps which actually made the determination. By accepting the Corps' decisions and recommendations carte blanche, the Secretary took them with whatever infirmities they had as a result of violations of landowner's constitutional rights. The certification of the purpose of a taking is subject to judicial review to ascertain whether it correctly states the true purpose, when there is a reasonable basis for a claim that the property involved is being taken in violation of the Constitution. There can be no better example of the soundness of such a rule than that which appears in the Notes on Land Acquisition, furnished by General Sturgis in the Hearings before a Subcommittee on Government Operations, House of Representatives, Eighty-fifth Congress, First Session, in the Investigation of the Army-Interior Land Acquisition Policy, in 1957.[20]

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[20] "Conference with Secretary Stevens in early May 1953; I was called to Secretary Stevens' office around May 5, 1953, and found with him a Mr. Johnson, attorney to (sic) Mr. Sid Richardson. After introducing Mr. Johnson, Mr. Stevens reminded me of his responsibility under the law for final certification of necessity in the public interest for the taking of land for project purposes, and that he was troubled by the general extent of the dissatisfaction he was aware of throughout the country by individuals who had been deprived of their property adjacent to our reservoirs, which property lay clearly outside the flowage line, sometimes as much as a mile away, *this property being taken under the guise of public access,* block-out, severance and similar *reasons that were in reality subterfuges for extending legal authority for acquiring land for recreation* and other purposes that would, and *were, not supportable by the courts in interpreting the law.*

"Therefore, the responsible authority charged by Congress for the certification of every taking, *Mr. Stevens said he was deeply troubled by the Chief of Engineers' application of the various flood-control laws over recent years.* He said that he was not personally against recreation for the public or the acquisition of land for fish and wildlife, or any other purpose for the public good; but

After the hearing above mentioned, Congress passed legislation authorizing the return to the owners involved in the Benbrook project of all lands taken above elevation 697.1, subject to a perpetual flowage easement and other restrictions. Many owners got such a return; but, as would be expected, Richardson was not one of them. He had instigated some of the investigation. The excess in Tract B-108 above elevation 697.1, which was tagged during the recreational planning stages as being ideally suited for building sites on account of its being on the "high bluffs", became most essential for basic project purposes. In their efforts to support such necessity, the Corps at one time suggested that it was needed as a site for burning brush—more than a section of land of this type for brush burning!

Since the early stages, the landowner has waived his right to question the taking as to the 560 acres, more or less, in Tract B-108 below elevation 697.1, as he had a right to do. See quotation from Nichols on Eminent Domain in footnote 16. The unconstitutional taking of the 647 acres, more or less, in such tract above elevation 697.1 vested in the United States with only a defeasible fee. Catlin v. United States and Maiatico v. United States, both supra. The title to such 647 acres should

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if such *purposes were the intent of Congress, Congress should so express itself by general authorizing legislation.* He supported this by asking me if there had not been cases of individual projects where Congress specified such purposes in the legislation authorizing such projects to which I answered affirmatively that there were; but a very few.

"Mr. Stevens then said that while he was not familiar in detail with acquisition determinations and actions in the case of Benbrook Reservoir *he was sufficiently informed to conclude that this was a particularly flagrant case of the general observation he had just cited*, and he asked me to hear what Mr. Johnson had to say generally about the acquisition policy there and specifically as to the case of his client, Mr. Richardson." (All emphasis added) (page 423).

be divested out of the United States and vested in the defendant landowners.

The government claims that none of the statements or actions of its officials offered in evidence is binding on it. The Court considers that evidence as to things said or done in the planning and formulation of the project is admissible on the ground, among others, that they were res gestae of the project itself. Aside from matters of that kind, the Court's findings and conclusions would be the same without the evidence questioned by the government.

The findings and conclusions in this memorandum opinion will be a part of the Court's findings of fact and conclusions of law. Rule 52(a), F.R.Civ.P. They will be considered along with the more specific findings of fact and the conclusions of law attached hereto as an appendix and made a part hereof. No significance should be attached to the fact that some matters appearing in the memorandum are not included in the appendix, or vice versa. The detailed findings show the basis for some of the conclusory findings in this memorandum, and are further explanation for some of the decisions herein stated. This memorandum helps to analyze, organize and summarize the facts, the inferences and the conclusions. It is the Court's intention that it and the appendix be considered together. Judgment will be entered in accordance with the findings and conclusions stated in such composite instrument.

Signed this 25th day of April, 1969.

/s/ Leo Brewster
Judge

APPENDIX C

Appendix to Memorandum Opinion

FINDINGS OF FACT

1.

At the time of taking on November 17, 1950, as well as at the time this suit was filed, S. W. Richardson was the owner of the land described in this case as Tract B-108. That tract, as described in the original complaint, in this case filed on July 28, 1950, contained 1452 acres. By amended pleading filed on November 24, 1950, the land in Tract B-108 was reduced to 1207 acres, and that was the amount of acreage in B-108 described in the declaration of taking and the order thereon, both dated November 17, 1950. The government sought to condemn the full fee simple title to the entire tract.

2.

S. W. Richardson died during the pendency of this suit, and Perry R. Bass, John B. Connally and Howell E. Smith, Independent Executors of his estate, have been substituted as parties defendant in his stead.

On July 28, 1952, the day of this suit was filed, the Court entered an order giving the United States the right to take immediate possession of all the property sought to be condemned in this action. That order was thereafter set aside on June 30, 1952, and the landowner restored to possession of all of Tract B-108 above contour elevation 697.1, the five year flood frequency line. Judge Davidson's order of June 30, 1952, was entered because of the government's refusal to submit to discovery, and it also stayed further proceedings in the case until the government complied with its discovery obligations. The Court of Appeals refused to set aside the order. The case remained at an impasse under the stay order for many years. The government's refusal to submit to discovery was for the purpose of keeping the landowner from getting proof that the only true purpose of taking the fee simple title to the portion of Tract B-108 above the 697.1 line was for public recreation.

4.

The facts in regard to the matters set out in the preceding are set out in detail in the order of June 30, 1952 and in the opinion of the Court of Appeals. The facts so stated are adopted as part of the findings of fact here. (204 F. 2d 552).

5.

Those presently handling the case for the government have given the Court the impression of having co-operated in discovery, and have been diligent in matters relating to the case.

6.

The Corps of Engineers made all the studies and the real decisions and determinations regarding the purpose and all other matters connected with the project. The Secretary of the Army merely accepted their recommendations without making any reasoned decision of his own. This litigation was instituted in pursuance of the Secretary's letter of July 12, 1950, to the Department of Justice, and was affected by two subsequent letters dated October 20, 1950 and December 20, 1950, respectively, from the Secretary to such Department.

7.

Mark Gurnee, Clare C. Casey and Woodrow Berge were the persons or officials with the United States Corps of Engineers who had the most responsibility of making recommendations to the then Secretary of the Army, Frank Pace, Jr., on which his letters, Plaintiff's Exhibits 1, 2 and 3, were based.

8.

The then Secretary of the Army, Frank Pace, Jr., in writing the letter of July 12, 1950, admitted as PX 1, was relying solely on the recommendations of the U. S. Corps of Engineers and without any independent information or investigation on his part of the engineering or design criteria, or of the necessities of the extent of the land to be taken or the estates therein as relating to Benbrook reservoir. There had been forwarded to him by the Corps of Engineers only the form of a letter to be signed by him addressed to the Attorney General and attached maps of the areas involved, requesting the filing of the condemnation proceedings as to Tract B-108 and other tracts.

The then Secretary, in writing the letter of October 20, 1950, admitted as PX-2, was relying solely on the recommendations of the U. S. Corps of Engineers and without any independent information or investigation on his part of the engineering or design criteria, or the necessities of the extent of the land to be taken, or the estates therein as relating to Benbrook reservior. There had been forwarded to him by the Corps of Engineers only a form of a letter to be signed by him addressed to the Attorney General requesting the filing of an amended petition in condemnation as relating to Tract B-108.

9.

The then Secretary, in writing the letter of December 20, 1951, admitted as PX 3, was relying solely on the recommendations of the U. S. Corps of Engineers and without any independent information or investigation on his part of the engineering or design criteria, or the necessities of the extent of the land to be taken or the estates therein as relating to Benbrook reservoir. There had been forwarded to him by the Corps of Engineers only a letter dated December 3, 1951, from Deputy Chief of Engineers, DX 109, as relating to Tract B-108.

10.

The Benbrook Dam and Reservoir project was authorized by Congress for the following purposes:

> "The improvement of the Trinity River and tributaries, Texas, for navigation, flood control, and allied

purposes is hereby approved and authorized in accordance with reports contained in House Document 403, Seventy-seventh Congress." (Public Law 14, Seventy-ninth Congress, First Session, 1945).

11.

House Document 403 related to the improvement of dams and reservoirs and work on the Trinity River and Tributaries in Texas, including the Benbrook Dam.

12.

Beginning as early as June 25, 1920, March 20, 1926, January 31, 1927, and September 18, 1935, the District Engineer submitted to the Chief of Engineers preliminary examination reports relating to flood control on the Trinity River. On February 15, 1937, a fifth report (DX 1), being a revision of the four previous, was submitted pursuant to the Flood Control Act of June 22, 1936, which provides:

> "(e) Flood Control Act, approved June 22, 1936:
>
> "Sec. 6. The Secretary of War is hereby authorized and directed to cause preliminary examinations and surveys for flood control at the following named localities . . . Trinity River, Texas."

After reviewing this last report, the Board of Engineers for Rivers and Harbors, and the Chief of Engineers directed that a survey for flood control be made.

13.

The District Engineer, through the Division Engineer, submitted to the Chief of Engineers a survey report dated November 15, 1939 which, together with the endorsement of the Board of Engineers for Rivers and Harbors, the transmittal letter from the Chief of Engineers to the Secretary of War, and the transmitted letter from the Secretary of War to the Speaker of the House, became House Document No. 403,—77th Congress, First Session (HD 403).

14.

The five preliminary examination reports and survey report submitted to Congress October 1, 1941 (HD 403) covered a period of engineering study of 21 years. In the survey report (HD 403), The Corps of Engineers in culmination of said 21 years of study made determination for design criteria, each of which the Court finds was reasoned and based on adequate determining principles, for a dam at Benbrook as follows:

(a) The Clear Fork rises in the extreme southwestern corner of Wise County in north central Texas, and flows in a general southeasterly direction through Parker County, thence northeasterly to its junction with the West Fort at Fort Worth.

(b) The Trinity River is formed at Dallas by the confluence of the West Fork and the Elm Fork which drain all of the Trinity River above Dallas.

(c) Precipitation on the Trinity River watershed has been observed officially since 1849, when a station was established by the United States Weather Bureau at Fort Worth, Texas.

Mean annual precipitation over the watershed ranges from a minimum of about 27 inches in the northwestern extremity of the basin to a maximum of 49 inches in the area where it empties into the Gulf of Mexico, with an average annual precipitation of 37 inches per year.

(d) The heaviest rainfall period generally occurs during the months of April, May and June, when approximately 35 per cent of the total annual precipitation occurs.

The 24-hour rainfall of 9.57 inches which occurred at Fort Worth September 4-5, 1932, is the maximum rainfall of record for a 24 hour period, as shown by the weather station there during the 51 years of record.

(e) The estimates of annual run-off for the Clear Fork at Fort Worth, Texas, for the record period, 1927-1937, covering a 508 mile drainage area is a minimum of .429 inches, a maximum of 5.271 inches, and a computed mean of 2.021 inches per square mile. With regard to the maximum annual run-off, the greatest general flood on the Trinity River occurred in 1908. Official estimates show that the Trinity River at Dallas covering a watershed of 6,028 square miles, had a run-off of 8.74 inches; an annual runoff of about 12 inches may be expected from practically any element of the watershed except possibly the portion above Fort Worth.

(f) The maximum precipitation for 38 years of record at Fort Worth, Texas is 3.37 inches in one hour; 5.48 inches in a two-hour period, and 9.57 inches in a 24-hour period.

(g) The worst general storm from the Trinity watershed from the standpoint of producing floods occurred on May 22-25, 1908, covered a period of four days, and was centered in southern and central Oklahoma, and covered the entire headwaters of the Trinity River to the mouth of the East Fork. It produced the second largest flood stage of record at Fort Worth.

(h) The storm of April 23-28, 1922, caused the highest river stage at Fort Worth for the period of record. It was centered over the Clear Fork, and a maximum record rainfall at the center was 12.57 inches, producing a peak discharge at Fort Worth of about 84,600 second-feet of which about 75,000 second-feet was contributed by the Clear Fork from a watershed of 514 square miles. From a time-depth-area comparison, this storm is the greatest of record that has occurred over the Trinity River Basin.

(i) The maximum flood of record on the West Fork at Fort Worth occurred in April, 1922, and had a maximum estimated discharge at Fort Worth from a watershed of 2,510 square miles of 84,600 second-feet, of which approximately 75,000 second-feet was contributed by the Clear Fork from a drainage area of 514 square miles.

(j) Relatively very low rates of discharge per square mile obtain along the Trinity River throughout its entire course from Fort Worth to Galveston Bay. This is attributable in part to the shape and slope of the watershed, and to climatological conditions which do not favor concentrated rainfalls over extensive areas on the watershed.

(k) "The flood-control plan presented in this report is designed to . . . provide full flood protection to the leveed portion of the cities of Dallas and Fort Worth against the probable maximum flood," by the construction of five new dams and reservoirs, including Benbrook Dam and Reservoir.

(l) In estimating the required capacities of the headwater reservoirs, the District Engineer employed two criteria:

> (1) That the reservoir capacity should be sufficient to control the probable maximum flood in the capacity of the floodways at Dallas and Fort Worth;
>
> (2) That the reservoir capacity should be sufficient to control the outflow from the reservoirs to channel capacity for all floods of record.

In addition, to provide 30,000 acre-feet of conservation storage in Benbrook Reservoir in the interest of conserving the water supply above the proposed head of navigation. Should the navigation project be not constructed, this storage may be utilized to advantage for stream regulation or recreation.

(m) In estimating safe spillway capacities, a design storm was selected. Of all the major storms which have occurred in the upper Trinity River Basin, the storm of September 25-28, 1936 was the greatest storm of record in this area.

After comparing the intensities and area-depth relations of this storm with those of other major Texas storms, and taking into consideration the difference in meteorological conditions existing in different parts of the States the rainfall rates and total depth of this storm were increased by 25% to estimate the probable maximum flood conditions of the watershed, and by 50% for estimating the spillway design flood.

(n) In designing the reservoir recommended for Benbrook, this augmented storm was redistributed by six-hour periods to produce the most critical flood conditions on the watershed and results in a *hypothetical* rainfall at Benbrook over a 54-hour period of 19.87 inches.

(o) The probable maximum discharge through the Fort Worth floodway out the proposed Benbrook Dam would be 94,800 second-feet which is in excess of its present capacity of 70,000 second-feet and it is proposed to enlarge this capacity to 95,000 second-feet to afford Fort Worth protection against the probable maximum flood.

(p) The design data for the proposed Benbrook reservoir is as follows:

Stream	*Clear Fork*
Drainage area (square miles)	424
Use	Flood control & navigation.
Storm	9/25 to 28, 1936
Rainfall at center (inches)	14.70
Average depth (inches)	13.25
Design storm, average depth plus 50 per cent (inches)	19.87
Infiltration rate (in inches per hour)	0.25
Total run-off (inches)	11.56
Inflow:	
Spillway design flood, peak (cubic feet per send)	181,100
Spillway design flood, volume (acre-feet)	261,406
Outflow:	
Total routed peak outflow (cubic feet per second)	60,000

Spillway:	
Length (feet)	440
Type	Ogee in approach channel
Control (gate dimensions in feet)	11-40 by 23.5 tainter gates
Capacity, maximum water-surface leval (cubic feet per second)	162,400
Capacity, top of dam (cubic feet per second)	238,500
Outlet Works:	
Type	Controlled conduit
Dimensions (feet)	Diameter, 13; length 1,350
Elevation invest (feet, mean sea level)	615.0
Capacity:	
Spillway crest (cubic feet per second)	4,500
Maximum water-surface level (cubic feet per second)	5,600
Top of dam (cubic feet per second)	5,800
Elevations:	
Dead storage level (feet, mean sea level)	615.0
Conservation level (feet, mean sea level)	650.0
Spillway crest (feet, mean sea level)	672.0
Tope of gates (feet, mean sea level)	695.5
Maximum water surface level (feet, mean sea level)	695.5
Top of dam (feet, mean sea level)	702.0
Maximum tailwater (feet, mean sea level)	619.5
Storage:	
Dead Storage level (acre-feet)	603
Conservation storage level (acre-feet)	30,603
Spillway crest (acre-feet)	87,795
Top of gates (acre-feet)	208,850
Maximum water surface level (acre-feet)	208,850
Top of dam (acre-feet)	254,627

(q) The construction of Benbrook Dam at river mile 11.3 with a ground elevation of 702 feet would provide sufficient storage for a conservation pool as water supply for navigation and for flood control. The design provides a controlled spillway with a clear opening of 440 feet and a crest elevation at 672.0 feet. Ample quantities of material suitable for embankment construction are available at this site.

(r) The estimated cost of Benbrook Dam and Reservoir is as follows:

Land purchase	$ 483,600
Clearing reservoir site	35,750
Railroad damages	35,992
Construction work on dam	4,650,160
Total Federal first cost of project	$ 5,205,502
Chargeable to conservation	749,000
Chargeable to flood control	4,455,602

and amortization of investment cost is 60 years.

(s) The proposed plan of improvement for flood control is designed for complete protection from the possible maximum flood for the City of Fort Worth.

(t) The District Engineer recommended the construction of the Benbrook Dam and Reservoir for flood control and allied purposes substantially as outlined in his report and also the adoption of a project for navigation on the Trinity River from Houston to Fort Worth. In recommending the navigation project, the District Engineer states that Benbrook Reservoir provides 30,000 acre-feet of storage in conjunction with flood control storage which, in turn, would provide 50 second-feet to supply the navigation water required at Lock No. 7.

15.

The Division Engineer recommended that the plan for the Trinity River substantially as outlined in the District

Engineer's report be approved, and that work be commenced, and that to secure immediate advantages of certain features not depending upon the entire plan, recommended authorization for the Benbrook Dam and Reservoir estimated at $4,500,000.

16.

Based upon the representations made by the District Engineer in HD 403:

a) The District and Division Engineers recommended canalization of the Trinity River from Liberty to Fort Worth for navigation purposes under a plan estimated to cost [$115,000.00.] (sic)

b) The Board of Engineers for Rivers and Harbors approved as justified for "flood control and conservation" Benbrook and other reservoirs mentioned in HD 403, and limited any navigation purpose approval to a channel from Houston to Liberty.

c) The Chief of Engineers concurred with the views of the Board of Engineers for Rivers and Harbors, but recommended that the plan proposed by the District Engineer be approved as a whole "for consideration in the future", recommending the "construction at this time of Benbrook, and the improvement of the levies and flood ways at Fort Worth and Dallas for flood protection and water conservation . . ." and a provision for a navigable channel from Houston to Liberty.

d) In forwarding these reports to Congress, the Secretary of War disapproved the $115,000,000 navigation program and approved the works proposed by the Chief of Engineers at a cost of $15,000,000, of which $5,205,502 was the estimated total cost of the Benbrook Reservoir project.

17.

On April 2, 1945, the District Engineer was authorized and directed to prepare a Definite Project Report for the construction and operation of Benbrook Dam and Reservoir, but no advance planning of the channel to Liberty.

18.

Less than one month after Congressional approval of the Benbrook Dam and Reservoir in accordance with HD 403 and as proposed by the District Engineer (based upon maximum *probable* precipitation), requests were made of the Hydrometeorological Section of the U. S. Weather Bureau for maximum *possible* precipitation. These studies necessarily resulted in greatly increased hypothetical precipitation which, in turn, calls for greatly increased dam and reservoir requirements, and greatly increased lands and estates therefor.

19.

Eight months after Congressional approval of Benbrook Dam and Reservoir upon the representations and recommendation of the District Engineer, and on November 14, 1945 the District Engineer submitted the preliminary hydrologic design report (DX 5) proposed for the construction of Benbrook Dam and Reservoir:

A. The District Engineer was recommending that the Corps of Engineers build a dam concerning which there were material and substantial variances from the Benbrook project described in H.D. 403 as authorized by Congress in each and all of the following specific particulars:

(1) A site approximately four miles from that authorized by HD 403;

(2) Use of maximum possible precipitation figures rather than maximum probable precipitation as a basis for a spillway design flood;

(3) Increase of reservoir storage as follows:

	As Authorized (HD 403)	As Designed (DX 5)
Dead Storage:	603 acre-feet (El 615)	13,760 acre-feet (El 636) (DX 5, p. 12)
Conservation Storage:	30,000 acre-feet (El 650)	72,000 acre-feet (El 636-669) (DX 5, p. 11)
Flood control storage:	178,247 (El 695.5)	192,520 acre-feet (El 699-703)

(4) Use of a hypothetical spillway design flood using maximum *possible* precipitation.

B. Routing the hypothetical spillway design flood then proposed by the District Engineer (which employed an initial loss of .90 inches, and an infiltration rate of .15 inches per hour resulted in a run-off of 24.5 inches—75% of the total rainfall, (DX 5) through a controlled spillway would result in a crest at elevation 686 and a maximum water surface of 705.1. Routing it through an uncontrolled spillway would result in a crest at elevation 700 and a maximum water surface elevation of 716.9.

C. The use of an uncontrolled spillway results in a maximum water surface at a higher elevation than a controlled spillway. The District Engineer recommended the use of a spillway which resulted in the highest maximum water elevation.

D. The design storm recommended by the District Engineer was based on the Taylor storm of September 6-11, 1921, which occurred along the Balcones Escarpment 150 miles from the Clear Fork, increased by unofficial observations resulting in a revised point rainfall equal or exceeding the world records of precipitation for periods of 2 to 18 hours.

E. This design storm was very hypothetical and could not be indiscriminately transposed to other areas because the predominating factor influencing its magnitude was the Balcones Escarpment and its proximity to the Gulf coast. Such a storm should be materially reduced for use as a spillway design storm in the upper Trinity River Basin.

20.

Fifteen days after the District Engineer submitted his preliminary hydrologic design report and on November 29, 1945, a meeting of consultants was held in the office of the District Engineer. A transcript of this meeting is contained in Defendant's Exhibit 5.

A. By this time, the District Engineer had decided to recommend raising the top of the uncontrolled dam another 24 feet.

B. At this meeting, members of the District Engineer's office urged that the dam be constructed at a site other than that authorized by Congress (DX 10); that an uncontrolled rather than the authorized controlled dam be built (DX 10); and that sedimentation, conservation, and flood storage be increased from that authorized by Congress.

C. Representatives of the District Engineer's office stated that comparative cost estimates showed that a saving of approximately one million dollars could be made by selecting the upper, rather than the lower (authorized) site (DX 10).

D. Representatives of the District Engineer's office represented that an uncontrolled spillway would cost approximately $2,400,000, and a controlled spillway $2,250,000 or a difference of only $150,000 (DX 10); concurred in the recommendation that they ignore a silt analysis study made by the Department of Agriculture and a $32,000,000 program then being carried on by the Department of Agriculture which would result in a considerable reduction of silt going into Benbrook; and, in computing sedimentation storage, use 100 years as the life of the dam (rather than the 50 years represented to Congress). (DX 10).

21.

At the time of the meeting of consultants:

A. Adequate investigation of the recommended site (river mile 15) had not been made. The investigation of river mile 15 had not been completed as to borrow materials, soil materials and embankment. (DX 10).

B. The consultants did not have comparable designs and estimates (DX 10) of the various types of spillways and some of the consultants were not prepared to vote on the spillway proposed by the District Engineer. (DX 10).

C. Some of the consultants did not have sufficient knowledge to take a vote on the matter. Others concurred in recommending that they ignore the siltation studies and preventive measures being taken by the Department of Agriculture, and double the estimated life of the dam in computing sedimentation storage. (DX 10).

D. Some of the consultants had no knowledge of the matters passed upon and others agreed to ignore and remain ignorant of pertinent factors bearing upon the matters before them. (DX 10).

22.

On April 1, 1946, the District Engineer forwarded the Definite Project Report (DX 9a) to the Chief of Engineers through the Division Engineer. The District Engineer stated that the Definite Project Report departed from the project as authorized by Congress as follows:

> "The general functions of the definite project plan are identical with the project document plan in that

both propose a dual-purpose reservoir providing for flood control and conservation storage. The plans differ in the dam axis location, type of spillway, and in the amount of allocation of reservoir storage. Reasons for the change in location and adoption of an untrolled spillway are given in paragraphs 5-01 and 5-04, respectively. Recent studies indicated a need for increased allocations of storages for sediment accumulation and water conservation. * * * A comparison of project document and definite project storage allocations is shown in table 7.

TABLE 7. STORAGE ALLOCATIONS

Purpose	Project document storage		Definite project storage	
	Acre-feet	Inches[1]	Acre-feet	Inches[2]
Flood control	178,247	7.88	170,380[3]	7.68
Conservation	30,000	1.33	72,500	3.27
Silt	603[4]	0.03	15,750	0.71
Total	208,850	9.24	258,630	11.68

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[1] Drainage area, 424 square miles.

[2] Drainage area, 416 square miles.

[3] Total flood control at spillway crest.

[4] Dead storage only.

On April 1, 1946, the District Engineer forwarded the Definite Project Report, sometimes called the "DPR" (DX 9a), to the Chief of Engineers through the Division Engineer and concerning which radical and substantial departures are disclosed upon a comparision of HD 403 and the DPR, and in connection with which the Court finds:

A. (1) The comparison of storage figures shown under the definite project storage is misleading. Under HD 403, flood control storage of 178,247 acre-feet is computed by deducting conservation and dead storage (30,603) from the acre-feet at maximum water surface level, 208,850 (X 2).

Applying this same method of computation to the reservoir capacity under the Definite Project Report (as constructed) and deducting dead and conservation storage of 88,250 from storage at maximum water surface, 410,013, shows a total flood control storage of 321,763 acre-feet.

(2) Reservoir capacity (475,241) to the top of the dam under the Definite Project Report (as constructed) is almost double that authorized by Congress (254,267 acre-feet). (DX 2).

B. The District Engineer represented that a comparison of cost estimates indicated that construction of the dam and reservoir at river mile 15 (instead of river mile 11.3 as authorized) would result in a savings of approximately one million dollars; that although the site approved by Congress provided a better natural spillway, the total savings in cost of the upper site was the controlling factor in adopting it as the definite site, and that a meeting of consultants held on November 29, 1945, it was the concensus of opinion that the dam should be constructed at river mile 15. (DX 9a).

1. Adequate investigation of comparative costs at the two sites had not been made at the time of the meeting of consultants. (DX 10).

2. Construction of Benbrook Dam and Reservoir at river mile 15 is a considerable increase in cost rather than saving as represented by the District Engineer.

The construction of the project at river mile 15 requires the "relocation of 6.1 miles of railway, 9.3 miles of telephone lines, 6.1 miles of telegraph lines, and 3 cemeteries, together with the alteration of 1.3 miles of Federal highway and the abandonment of 15.0 miles of power lines and 11.0 miles of county roads" at an estimated cost of $1,875,172 (DPR, pp. A and 1, HD 403) whereas the estimated cost of relocations as contained in DH 403 shows only "railroad damages . . . $37,992."

C. The District Engineer represented and recommended the construction of a sidehill uncontrolled spillway costing $1,400,000 more than the controlled spillway (authorized by Congress) on the ground that in his opinion and that of the consultants, the operational advantages inherent in such a spillway outweighed the differential in costs. (DPR p. 8).

1. The outlet works in the valley would take care of all flow up to the storm of record The only water which would pass over the proposed spillway would be from floods in excess of those of record. (DX 10). A storm twice the flood record would be required to cause flow over the crest of the spillway. (DX 10).

2. Many of the consultants had not been furnished and did not have comparable designs and estimates (DX 10, p. 12) of the different types of spillways.

3. A 3.5 inch flood control storage below El 710 is sufficient to regulate all floods of record, and computation of benefits for floods producing reservoir levels above 710 is not feasible on the basis of recorded events. (DX 7)

D. The District Engineer represented that it was necessary to increase sedimentation storage from 603 acre-feet to 15,750 acre-feet based upon sedimentation studies made by the Department of Agriculture.

1. The studies by the Department of Agriculture referred to by the District Engineer (DX 5), were completed in 1939, prior to the time HD 403 was submitted to Congress (October 1, 1941).

2. At the time the Department of Agriculture had a $32,000,000 flood control authorization on the upper Trinity River Watershed which would result in a considerable reduction of silt going into the Benbrook Dam and Reservoir (DX 10, pp. 51-55).

3. The District Engineer concurred with the recommendation of the consultants at the meeting on November

29, 1945 that they ignore the studies of the Department of Agriculture, and increase (for sedimentation storage) the economic life of the project from 50 to 100 years.

4. There had been no change in the studies or otherwise from the time HD 403 was submitted to Congress when the District Engineer recommended 603 acre-feet of sedimentation storage, to November 14, 1945, when the District Engineer recommended an increase to 13,750 acre-feet of sedimentation storage, nor to the time of submission of the Definite Project Report (April 1, 1946) wherein the District Engineer proposed 15,750 acre-feet of sedimentation storage.

E. The District Engineer represented the conservation storage should be increased from 30,000 acre-feet (as authorized) to 72,000 acre-feet to meet full headwater navigation demand over 99.6 second-feet from the Benbrook Reservoir when possible, and that because of an increasing demand for water conservation, pollution abatement, low flood regulation and water supplies from municipalities and industrial uses it was advisable to increase the conservation storage. (DPR, p. 14).

1. The 30,000 acre-feet proposed in HD 403 was for the purpose of providing 50 cubic feet per second under the comprehensive navigation proposal for Lock No. 7 about 200 miles below Fort Worth. (HD 403, pp. 124, 132). Lock No. 7 and all navigation purposes except channel between Houston and Liberty were eliminated from HD 403 as approved by Congress and the need for impounding these 30,000 acre-feet of water to supply Lock No. 7 was unnecessary. (DX 2).

2. During the 50 years that Benbrook would be in operation, conservation storage provided in it will be supplemented by additional storage in a number of other projects. The provision of conservation storage in these additional projects would modify the need for conservation storage at Benbrook.

3. There is no evidence that municipalities would or are using water from Benbrook or that it is being used industrially even though it may have been authorized by a 1956 Act of Congress. There is no evidence of any other purpose for which conservation storage, as authorized by Congress, should be increased.

4. Increasing the conservation storage to provide 99.6 second-feet for full headwater navigation demand was not authorized.

24.

No resubmission to Congress was made for additional authority in connection with the changes or modifications in the project as built and the project as authorized by House Document 403.

25.

Each and all of the changes and modifications resulted in building a higher dam and resulted in a claimed necessity (to conceal the real purpose—recreation) for the taking of more land, and more particularly as follows:

(a) The change from a gated to an ungated spillway.

(b) Raising the spillway crest elevation from 672 ft. to 724 ft.

(c) The increase of storage capacity from 208,850 acre-feet to 410,000 acre-feet.

(d) Increase of the spillway design storm from 19.87″ (the greatest of record in appropriate area plus 50%) to a theoretical storm of 28.2″ over a 60-hour period as defined by the Corps of Engineers to the Hydrometeorological Section of the Weather Bureau as being the worst possible maximum storm that could ever occur under the worst possible situations when coupled with the variables.

(1) Storms of record were transposed many miles from the vicinity of the Benbrook watershed and from

areas affected by the existence of the Balcones Escarpment and the Edwards Plateau many miles nearer to the Gulf of Mexico and the hurricane effect in the late summer and fall of the year when actual experience at Benbrook has been that the greatest storms of record have occurred in the spring, April, May and June.

(2) There has never been a storm since the preparation of House Document 403 on Benbrook greater than the transposed storm in 1936 from Ennis.

(3) In assuming in the Benbrook Reservoir that there was no initial loss except included in an average infiltration rate when initial loss due to the type of ground cover and the soil ordinarily varies from zero to as much as an inch of initial loss.

(4) In assuming an infiltration rate of fifteen hundreths of an inch operating during the entire rainfall period, which is on the relatively low side, the Corps of Engineers taking the benefit of such a variable in the assumptions concerning the run-off rate from the hypothetical storm.

(5) The assumption that the reservoir was full at an elevation of 710 ft. with the outlet valve closed and inoperative at the time of the occurrence of the theoretical worst possible storm assuming that one storm had placed the elevation at 710 ft. and then the big theoretical storm of 28.2″ over sixty hours was put on top of it.

26.

The average *annual* run-off of the Clear Fork at Fort Worth for the period 1924-1945 is 77,680 acre-feet or the equivalent of 2.87 inches of run-off from a 508 square mile drainage area.

The maximum run-off amounting to 232,000 acre-feet occurred in 1945.

The maximum monthly run-off amounting to 123,900 acre feet occurred in April, 1942.

The spillway design storm is based upon a theoretical run-off occurring in a 60-hour period, and resulted in a theoretical total flood volume of 483,800 acre-feet.

The total flood volume of 483,000 acre-feet is twice the maximum annual run-off of record, four times the maximum monthly run-off of record, and over six times the average annual run-off.

The infiltration rate used by the District Engineer (.15 inches per hour) is less than the average infiltration rate for the period of record.

27.

The spillway design storm equals or exceeds the world's records of precipitation in the area here involved for a period of 2 to 18 hours, and is very hypothetical and should be materially reduced for use as a spillway design storm in the upper Trinity River (DX 6).

It is unlikely and improbable in the area here involved that a storm of the magnitude of the spillway design storm could follow within a few days a flood large enough to require storage above elevation 710.

28.

By using maximum *possible* precipitation (rather than recorded storms, water storage and land claimed (although the real purpose was concealed) to be acquired therefor was necessarily greatly increased.

29.

The use of such hypotheticals as contrasted to recorded events is unreasonable and patently in conflict with the representations upon which Congress authorized Benbrook Dam and Reservoir.

30.

The rainfall depth of 28.2″ of rain over a sixty-hour period, the theoretical storm concocted by the Hydrometeorological Section of the Weather Bureau, was excessive and without reasonable determining principle in view of (a) the fact that the average annual rainfall for the Benbrook watershed has been found by the U. S. Corps of Engineers from the records kept since 1899 to 31.3″ per annum; (b) the storms transported in attempting to justify the theoretical storm were from areas in Texas many miles distant from Benbrook and subject to the effects of the Balcones Escarpment and the Edwards Plateau coupled with the proximity of the Gulf of Mexico and the movement of hurricanes (the hurricane affected storms occur in the fall of the year as contrasted with the actual records of Benbrook watershed showing the worst storms occur in the spring) inland from the Gulf crossing the natural barriers of the escarpment and the plateau; (c) the storms described on PX 10 and PX 11 are not reasonably transposable to the watershed of the Benbrook reservoir; and (d) that the maximum reasonable storm over the Benbrook watershed is approximately 12″.

31.

The storms listed on Plaintiff's Exhibit 10 are not reasonably transportable to the watershed of the Benbrook reservoir for each and all of the reasons:

(a) The substantial and material distances from the Benbrook reservoir as shown on stipulation filed by the parties in this cause;

(b) The proximity of the storms numbered 1, 11, 14 and 15 to the Gulf of Mexico as compared to the distance of the Benbrook Reservoir from the Gulf;

(c) Storms listed on Plaintiff's Exhibit 10 as 3, 5, 6, 9, 10, 12, 13 and 17 were definitely triggered by the orographic effect of the Balcones Escarpment and/or the Edwards Plateau, neither one of which is close enough to affect storms in the Benbrook watershed.

32.

The Corps of Engineers' estimate of the economic life of the Benbrook Reservoir is 50 years.

33.

The five-year frequency of the flood of the Benbrook reservoir is at elevation 697.1 feet.

34.

The portion of Tract B-108 above elevation 730 is in no danger of flooding. That between 697.1 and 730 is subject to very infrequent flooding. The five year flood frequency level is 697.1.

35.

The determination of the 741 foot elevation was arbitrary, capricious and beyond and in substantial variance with the authority granted by Congress in authorizing the project.

36.

Within a few months after the approval of Congress of Benbrook pursuant to House Document 403, plans were being formulated for the construction of permanent recreation facilities including areas for day-use recreation, overnight camps, tourist accommodations and small homes and cottages.

37.

The final plans for recreation development at Benbrook are in the form of an Appendix VIII E to the Definite Project Report (DX 9a), which, unlike the other appendices, was stamped "Not for public release."

38.

The Corps of Engineers admits that public recreational use of the land is an advantage but not a purpose in the acquisition of land for a reservoir such as Benbrook, and that recreational use should not become the controlling factor in establishment of the taking line and whether to take in fee or in fee and easements.

39.

Although the Corps of Engineers admitted and stated publicly that such recreational use should not become a controlling factor in the establishment of taking line or whether to take in fee simple or a combination of fee simple and easements, recreational use was the only factor in the acquisition of the fee simple title to the portion of Tract B-108 lying above contour line 697.1.

40.

Before March of 1946, the Corps of Engineers had embarked upon a master plan for recreation at Benbrook as indicated by dates shown on maps introduced in evidence. The DPR was released April 1, 1946.

41.

Appendix VIII E to the DPR relating to the feasibility of recreational development at Benbrook was not issued to the public, bearing a legend "not for public release", until at some later date, all as a part of the plans to conceal the real purpose for the excessive taking of land at Benbrook.

42.

The concealment of the real purpose of the excessive taking of lands for recreational purposes was further implemented by the change of designation relating to expenses from "for recreation" to "preparation of master plan for reservoir management."

43.

Even in the early stages of the project planning, there was prepared an elaborate map showing recreation areas prepared by a government employee in connection with his duties in working on this project, a good part of which was located on Tract B-108. (DX 11-A).

44.

The elaborate plans for public recreational use of the lands taken in excess of that required for flood control and storage for navigation on the lower Trinity River included maps showing sites planned to be used for parks, club sites, picnic grounds, ampitheater, floating boat house, concessions, trailer parks, play grounds, cabin sites; and other similar uses as desired, overnight camping, tourist accommodations, summer homes and cottages, an important part of which was located on Tract B-108, and some or all of which were to be leased back to concessionaries by the Corps of Engineers in the operation of the reservoir.

45.

The Corps of Engineers selected potentional recreation areas near the main body of the reservoir including a part of Tract B-108 for acquisition in fee for such recreational uses.

46.

Although authorized to take only the amount of land reasonably necessary to operate the reservoir and to protect the government against claims for damages for flooding, the Corps of Engineers in its zeal to acquire excess lands for recreational use, and with reference to Tract B-108 in particular, had under consideration five different taking lines with acreages of 1589, 1320, 1460, 1437 and 1207 acres. The only consideration being given as to the different areas was for development of public recreation.

47.

The primary purpose of acquiring lands above elevation 730 under the project as proposed in the Definite Project Report was of recreation. The Corps of Engineers proposed to acquire land between elevation 730 and 741 to prevent the construction of improvements thereon by private interests because the topography of this strip is excellent for the development of home sites and if let in private ownership, would unquestionably be subdivided into homes sites and camp sites.

48.

The Corps of Engineers was fully aware that portions of Tract B-108, which they proposed to acquire for recreational purposes, were not necessary for authorized project purposes.

49.

The Corps of Engineers acquired some land, including portions of Tract B-108, for recreational facilities under the guise that such lands were necessary because of "engineering considerations."

50.

A perpetual flowage easement of lands in Tract B-108 between the 697.1 and 730 levels is all that is reasonably necessary for the construction, operation, and maintenance of Benbrook Dam and Reservoir as proposed by the Definite Project Report. This is in accordance with sound economics and was recognized by the Corps of Engineers and the District Engineer.

51.

On June 30, 1950, the District Engineer recommended and the Corps of Engineers approved and forwarded to the Secretary of the Army for appropriate proceedings for the filing of a petition in condemnation for Tract B

108 encompassing 1452 acres 'which extends from the river to the high bluffs.'' (DX 73). The top of the bluff offers a very desirable site for the development of lodges and club sites, and in the original plan *tof* recreational development, thought was given to such development and certain promonotories were included within the proposed government taking.

52.

The defendant Richardson offered to donate to the government fee simple title to all land on Tract B-108 before El 694, and a perpetual flowage easement with the waiver of all damages above El 694.

53.

From the date of the order of the Court of June 30, 1952 to the date of this trial, October 11, 1965, the government had not had possession or right of control over any part of Tract B-108 now in question. The operation of the reservoir was not hampered or interferred with during such period of time. Any use of the lands in B-108 above the level of the water is not necesary in the operation of the reservoir.

54.

The government has conceded that it is only necessary to acquire fee simple title to approximately 560 acres lying below elevation 697.1 of Tract B-108, and that a flowage easement is adequate in the remaining 647 acres of land lying above elevation 697.1 and to elevation 741, in the proper operation of Benbrook to properly serve the needs of the government.

55.

Even assuming authority to build the dam as built at Benbrook, the taking of fee simple title to Tract B-108 to the taking line of 741 feet (with considerable acreage being taken above that elevation) is unnecessary and unwarranted for the reason that there was only needed for flood control and conservation purposes the fee simple title to elevation 697.1 feet, (the five-year frequency flood level) with flowage easements above that elevation to protect the government from claims of damages, to elevation 731 feet.

56.

Public recreation use was the actual purpose for which the fee simple title to land above contour line 697.1 was taken. No estate whatever, not even a flowage easement, was needed on any land above the 731 foot level, for the basic legitimate purpose of the project.

57.

The taking of more land and greater estates in Tract B-108 than was reasonably necesary for the operation of the project and protection of the government from damage claims has resulted in substantially more cost to the government.

CONCLUSIONS OF LAW

1.

The Court has jurisdiction of the subject matter of the parties to this action.

2.

Under the circumstances of this case, the Secretary's stated purpose of the taking is subject to judicial review to determine if it was in truth the actual purpose.

3.

The Secretary's certification of the purpose of taking cannot be used by the government as an impenetrable shield to deprive the landowner of the opportunity to show that his constitutional right of due process under the Fifth Amendment to the Constitution of the United States was being violated by an unauthorized taking of his land.

4.

The stated determination of the Secretary made solely on the basis of unreasoned acceptance of decisions and recommendations of the Corps of Engineers was tainted by any impropriety of the Corps involved therein of such proportions as to cause a landowner to be deprived of his property without due process of law in violation of his rights under the Fifth Amendment to the Constitution of the United States.

5.

The changes in the Benbrook Reservoir Project as authorized by Congress and the project as actually built were radical and substantial and did not come within the purview of any congressional authority, express or implied. The project, as built, was therefore unauthorized by law, and resulted in the wrongful taking of all the 1207 acres in Tract B-108. The landowner herein was specially affected by such excess of authority by the potential loss of his property and can maintain an action to recover all or any part of Tract B-108.

6.

The taking of property in connection with the Benbrook project for public recreational use only was not authorized by law at the time of the taking of Tract B-108. The taking of that portion of Tract B-108 above elevation 697.1 feet, containing 647 acres, more or less, purely for recreational purposes was a departure from statutory limits and therefore invalid.

7.

A landowner may waive his right to challenge the validity of a taking insofar as it relates to all or any part of a tract of land owned by him. The defendant landowner in this case has waived the right to challenge the taking of the portion of Tract B-108 lying below elevation 697.1, containing 560 acres, more or less, but still has the right to recover just compensation for it.

8.

The taking of the portion of Tract B-108 above elevation 697.1 feet, either for a project that was not authorized by law or for a legally unauthorized purpose, or both, deprived the defendant landowner of his property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

9.

The declaration of taking relating to Tract B-108 and the order thereon, entered herein on November 17, 1950, vested only a defeasible title in the United States of America to Tract B-108, subject to the landowner's right to challenge the validity of the taking of such tract or any portion thereof.

10.

The declaration of taking and the order thereon mentioned in the preceding paragraph should be set aside and held for naught insofar as they relate to the portion of Tract B-108 lying above the 697.1 foot elevation, and the title to such portion should be divested out of the United States of America and vested in the defendants Perry R. Bass, John B. Connally and Howell E. Smith. Independent Executors of the Estate of Sid W. Richardson, deceased, subject to any and all valid easements.

11.

The title to the 560 acres, more or less, in Tract B-108 lying below the 697.1 elevation should be finally vested in the United States of America, subject to any and all valid easements.

Signed this 25th day of April, 1969.

/s/ LEO BREWSTER
Judge

Filed May 1, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 2025
TRACT NO. B-108

UNITED STATES OF AMERICA

v.

2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS
(S. W. RICHARDSON)

Motion for Amendments and Additions of Findings

Defendants, PERRY R. BASS, JOHN B. CONNALLY and HOWELL E. SMITH, Independent Executors of the Estate of S. W. Richardson, Deceased, in accordance with the provisions of Rule 52(b) of the Federal Rules of Civil Procedure, move that the findings of fact heretofore entered be amended and findings in addition to those heretofore made, be made as follows:

PROPOSED AMENDMENTS TO FINDINGS

Finding 3:

Substitute July 28, 1950 for the date stated as the date this suit was filed.

REQUESTED ADDITIONAL FINDINGS

1.

Defendant, S. W. RICHARDSON, now deceased, timely filed an answer to the original petition for condemnation, as amended, to the effect that the attempted taking was unauthorized, arbitrary, capricious, and without rational foundation in fact.

2.

For several months prior to December 31, 1951, Defendant's attorneys unsuccessfully attempted to reach an agreement with the Petitioner's attorneys for taking the oral deposition of Secretary of the Army, Frank Pace, Jr., for the purpose of proving that the project as actually built and the plan under which the land in question was sought to be taken, substantially departed from and greatly exceeded the Congressional authority as to location, area, size and purpose, and that the Secretary's act was unreasoned, arbitrary, and without adequate determining principle.

3.

On December 20, 1951, Frank Pace, Jr. forwarded the letter of that date (PX 3).

4.

On December 31, 1951, Defendant served notice under Rule 26 to take the oral deposition of Frank Pace, Jr., Secretary of the Army, as an officer and managing agent of the Petitioner.

5.

Upon the advice of the Department of Justice, the Secretary of the Army, Frank Pace, Jr. failed to appear at the time and place provided in the notice herein described in paragraph 4 above.

6.

On January 28, 1952, Defendant filed and duly served a Motion to Dismiss the condemnation, for the application of sanctions under Rule 37, and for such further orders of the Court as might be appropriate.

7.

Defendant's Motion (described in Paragraph 6 above) was heard before the Court on February 11, 1952 and by Order dated February 28, 1952, the Court held said motion in abeyance and ordered Frank Pace, Jr. to submit to the taking of his oral deposition in Washington, D.C. within 30 days thereafter.

8.

At the Hearing held on February 11, 1952, Petitioner's attorneys stated that the Court might enter an Order for the taking of such deposition in Washington, D.C. and that Frank Pace, Jr., would thereupon make himself available.

9.

On March 17, 1952, Petitioners filed an "Amended Response and Objection To The Taking of the Deposition of Frank Pace, Jr., Secretary of the Army" stating that said Secretary was not required by law to submit to the taking of his deposition; that the office of the Chief of Engineers, the office of the District Engineers, and parties working for the Corps of Engineers had the data supporting the Secretary's determination of necessity for the taking of Tract B-108; that the exercise of the Secretary's determination of the character, extent, and necessity of the condemnation is not subject to judicial review, and that the taking of such deposition would not be relevant in determining the issues involved.

10.

On April 3, 1952, Defendant responded renewing Defendant's previous motion for appropriate orders under Rule 37. On April 3, 1952, a Hearing was held wherein the Petitioners insisted that there was no necessity for the taking of the Secretary's deposition, and that petitioners were willing to make reply to request for admissions which would be binding upon Petitioners on all or most of the points which might otherwise be covered by oral deposition.

11.

On May 3, 1952, the Court entered its order holding in abeyance Defendant's Motion for Application of sanctions under Rule 37 pending the reply by the Secretary to requested admissions, attached to said Order, within ten days thereof.

12.

Subsequently, and at Petitioner's request, the Court extended the time for the filing of replies to the request for admissions described hereinabove in Paragraph 10 to May 20, 1952, but, upon the advice of the Department of Justice, the Secretary failed to make such reply.

13.

On June 30, 1952, a Hearing was held whereat the Court was advised that the parties did not desire to offer anything further and the Court thereupon entered its Order of said date

> "... that this cause be not now dismissed, but that such cause and any prosecution of it by Petitioner, its agents, officers or attorneys, as against S. W. Richardson and Tract B-108 should be and the same is hereby abated.
>
> "(2) Any and all orders for possession of Tract B-108 of the defendant S. W. Richardson heretofore entered by this Court should be and are hereby set aside and held for naught, and any possession, right of control, dominion or use under such orders for possession as to all or any part of said Tract B-108 now asserted or hereafter attempted to be asserted by Petitioner herein or any of its officers, agents, or employees are hereby declared to be without authority, and all judicial writs of possession, process, and remedies for relief invoked by Petitioner, its officers and agents, against Defendant S. W. Richardson and Tract B-108

should be and the same are hereby withdrawn and suspended."

14.

The Order described hereinabove in Paragraph 13 was affirmed by the Court of Appeals for the Fifth Circuit (204 F. 2d 552), and Petitioner took no appeal.

15.

The five-year frequency of flood of the Benbrook reservoir is at elevation 697.1 ft. (DX 95a).

16.

The Original Petition describing 1452 acres in Tract B-108 and in which it was stated that this is an area for the operation and maintenance of the reservoir was not factually correct, and reflects an attempt on the part of the Corps of Engineers to acquire as much land as possible for recreational purposes and in excess for that reasonably needed for the operation of the reservoir. (Original Petition filed July 28, 1950, and Amended Declaration of Taking to acquire a lesser area of 1208 acres, filed November 17, 1950).

17.

In view of the owner of Tract B-108 offering to donate without cost to the government an overflow easement and waiver of damages as a covenant running with the land above elevation 694, if the government would accept and not seek to take the title above that level, the refusal of the U. S. Corps of Engineers to accept the same as being all that was needed for the proper operation of the reservoir and protection of the government against claims for damages, conclusively establishes that the fee simple title sought to the taking line was arbitrary, capricious and unreasoned and based only on a desire to seize and control more land than needed for the reservoir for recreation and public uses. (DX 78, 79, 80, 81).

18.

The refusal of the Corps of Engineers to furnish information concerning reservoir operation, frequency of flooding and other data concerning the lands above the conservation pool elevation and in refusing to justify taking fee title on engineering criteria, conclusively establishes that the action in taking fee simple title to elevation 741 is arbitrary, capricious and without valid determining principle and was an attempt to conceal the real purpose of the taking, to wit, recreational use.

19.

The failure or refusal of the Secretary of the Army, Frank Pace, Jr., to answer interrogatories or to give his deposition while he was in office was upon the advice of the Department of Justice and establishes that the action in taking fee simple title to elevation 741 is arbitrary, capricious and without determining principle, and was an attempt to conceal the real purpose of the taking, to-wit, recreational use.

Dated: May 1, 1969.

CANTEY, HANGER, GOOCH, CRAVENS
& SCARBOROUGH
R. DANIEL SETTLE
CARLISLE CRAVENS

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[Filed June 12, 1969]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 2025
TRACT NO. B-108

UNITED STATES OF AMERICA

v.

2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS
(S. W. RICHARDSON)

Order on Motions for Amendments and Additions of Findings

1.

The landowner defendants have requested that one of the findings of fact in the memorandum opinion heretofore entered in this case be amended so as to substitute July 28, 1950, for the date stated as the time when this suit was filed. July 28, 1950 is the correct filing date. The date included in the memorandum opinion is a typographical error. The requested substitution is therefore made.

2.

Paragraphs numbers 1-14, both inclusive, and 19, contain requests for additional findings relating to the government's refusal to comply with discovery, to the stay order entered by Judge Davidson as a result thereof, and to the action of the Court of Appeals refusing to set aside such order. All of such matters are covered in summary fashion in the Court's memorandum opinion, but the requests relate to facts established by the record. The landowners are therefore entitled to have such facts found with the following modifications:

(a) Paragraph numbered 2 states that the defendant's attorneys unsuccessfully attempted to reach an agreement with plaintiff's attorney for taking the oral deposition of Secretary of the Army Pace *for the purpose of proving* that the project as actually built, etc., substantially departed from the Congressional authority as to location, area, size and purpose, and that the Secretary's act was unreasoned, etc.

The Court substitutes the words "with the expectation of proving" for the words "for the purpose of proving" in its findings.

(b) Paragraph numbered 19 says that the failure or refusal of Secretary of the Army Pace to answer interrogatories and to give his deposition while he was in office was upon the advice of the Department of Justice and establishes that the action in taking the fee simple title to elevation 741 was arbitrary, capricious and without determining principle and was an attempt to conceal that the real purpose for the taking was for recreational use. The Court did not pin the conclusions set out in its memorandum opinion as to the issue of the taking on any one particular fact. The Secretary of the Army did refuse to answer interrogatories and to give his deposition while he was in office and such refusal was upon the advice of the Department of Justice. The refusal was for the purpose of concealing the fact that the real taking was for recreational use. Those circumstances were taken into consideration along with all the other pertinent matters set out in the memorandum opinion in arriving at the conclusions contained therein. The Court has no desire to change that situation and to make its conclusions dependent upon any one particular fact.

3.

The Court finds that the five-year frequency flood line at the Benbrook Reservoir is at elevation 697.1 feet, as requested in paragraph numbered 15.

4.

Paragraph numbered 16 reads as follows: "The Original Petition describing 1452 acres in Tract B-108 and in which it was stated that this is an area for the operation and maintenance of the reservoir was not factually correct and reflects an attempt on the part of the Corps of Engineers to acquire as much land as possible for recreational purposes and in excess for that reasonably needed for the operation of the reservoir. (Original Petition filed July 28, 1950, and Amended Declaration of Taking to acquire a lesser area of 1208 acres, filed November 17, 1950)."

The Court does find, and considers that it has heretofore found in its memorandum opinion, that the full 1452 acres were not taken for flood control and the operation and maintenance of the reservoir, and the landowners are entitled to the requested finding to the extent that it applies to acreage in Tract B-108 above elevation 697.1. To that extent, the attempted taking of the land in excess of that needed for flood control reflected an effort on the part of the Corps of Engineers to acquire as much land as possible for recreational purposes only.

5.

The paragraph numbered 17 requests a finding to the effect that the offer of Richardson to donate without cost to the government an overflow easement and waiver of damages as a covenant running with the land above elevation 694 in Tract B-108, if the government would not seek to take the fee simple title to the land above that level, and the refusal of the Corps of Engineers to accept such offer, conclusively establishes that the fee simple title sought to be taken was arbitrary, capricious and unreasoned and was based on a desire to seize and control more land than was needed for the reservoir and public use. In its memorandum opinion, the Court made what it considers to be adequate findings in connection with the offer of Richardson above mentioned. It did not take such offer and the refusal to accept it into consideration in arriving at the conclusion that the taking in question was illegal. It considered such matter, along with the other relevant facts and circumstances, on the issue of waiver by Richardson of his right to complaint of the government's taking of his land below 694.1. The Court does not see where such facts are material to any other issue.

6.

The finding requested in paragraph numbered 18 is refused.

The amendments and additional findings above indicated are hereby made as set out above, and, where so indicated in this memorandum, the requested findings are refused. It is accordingly so ordered.

Signed this 11th day of June, 1969.

/s/ LEO BREWSTER
Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 2025
TRACT NO. B-108

UNITED STATES OF AMERICA

vs.

2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS
(S. W. RICHARDSON)

Judgment

The severed issue of the right to condemn that portion of Tract B-108 herein above elevation 697.1 feet above mean sea level, containing 647 acres, more or less, has been duly litigated before the Court without a jury in a trial held after proper notice, with the respective attorneys of record for each of the parties present and participating. The Court has reached a decision as to the judgment that should be entered on that issue in regard to Tract B-108 described in the declaration of taking filed herein on November 17, 1950, and has filed findings of fact and conclusions of law giving the reasons therefor.

It is therefore decreed that the declaration of taking and the order thereon as to said Tract B-108, filed herein on November 17, 1950, be and they are each hereby set aside and held for naught insofar as they relate to the portion of Tract B-108 above elevation 697.1 feet, containing 647 acres, more or less, and that the title to such property be thereby divested out of the plaintiff, United States of America, and vested in the defendants, Perry R. Bass, John B. Connally and Howell E. Smith, Independent Executors of the Estate of S. W. Richardson, deceased, subject to any and all valid easements on said land.

It is further decreed that such declaration of taking and the order entered thereon remain in full force and effect as to the portion of said Tract B-108 lying below contour elevation 697.1 feet, containing 560 acres, more or less, and that all such right, title and interest as the landowner, S. W. Richardson, may have had in such land at the time of the taking thereof on November 17, 1950, be hereby finally divested out of the defendants herein and vested in the United States of America as of such date of taking, subject to any and all valid easements of said land, and without prejudice to the landowner's right to recover just compensation.

Signed this 25th day of April, 1969.

/s/ LEO BREWSTER
Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 28390

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

versus

2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS, and FRANK CORN, ET AL, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Texas

(October 16, 1970)

Before GEWIN, GOLDBERG and SIMPSON, Circuit Judges.

GOLDBERG, Circuit Judge: In this condemnation proceeding the government appeals from a final judgment setting aside a declaration of taking[1] for the Benbrook Dam and Reservoir in Tarrant County, Texas. The judicial asides and interregnum of the Benbrook project cover a span of many years, and mere time has not laid its problems to rest. Now, more than twenty years after the land was taken by the United States and years after water began to flow over its spillway, we must test its birth and development for legitimacy.

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[1] Title 40 U.S.C.A. § 258a provides that in any condemnation case title to condemned land immediately vests in the United States after the authority empowered to acquire the lands files a declaration of taking and deposits the estimated compensation due.

The saga of Benbrook Dam began in 1944 when Congress was presented a report, later denominated House Document 403, containing plans and specifications for a proposed dam and reservoir to be built on the Clear Fork of the Trinity River near Fort Worth, Texas. Congress subsequently authorized the construction of the Benbrook project in Public Law 14, Act of March 2, 1945, Pub. L. No. 79-14, § 2, 59 Stat. 10, which provided that

> "The improvement of the Trinity River and tributaries, Texas, for navigation, flood control, and allied purposes is hereby approved and authorized in accordance with the reports contained in House Document numbered 403, Seventy-seventh Congress;"

Pursuant to this authorization, the United States in 1950 instituted condemnation proceedings to secure the land needed for the Benbrook project. Included in the land sought by the government were 1,207 acres from tract B-108 owned by Sid W. Richardson. The Secretary of the Army filed a declaration of taking stating that

> "The public uses for which said land is taken are as follows: The said land is taken to provide for the construction and operation of Benbrook Dam and Reservoir on the Clear Fork of the Trinity River in Trinity River Basin, Texas."

Richardson, the landowner, filed an answer objecting to the taking of his property on the grounds that the taking transgressed legislative purposes and that the proposed construction departed from authorized project specifications. Specifically, Richardson alleged first that the fee interest in his land above a certain level was not sought for the purposes sanctioned by Public Law 14 and espoused by the Secretary of the Army—the construction and operation of Benbrook Dam—but was earmarked for recreational use, a purpose not authorized by Congress. Second, Richardson argued that the dam and reservoir being constructed were a substantial departure from and at variance with the public work described in H.D. 403 and authorized by Public Law 14, and that the Secretary's attempt to take the land was arbitrary and capricious because unauthorized by law.

After a fifteen-year delay[2] and the death of the landowner, proceedings on this claim were finally held before the district court sitting without a jury. The court made copious findings of fact and concluded that the land lying above 697.1 foot elevation (647 acres) was taken for a recreational purpose and that condemnation for such a purpose was not authorized by Public Law 14. The trial court further concluded that the entire taking was without authority because the dam and reservoir as actually built were materially changed from the project authorized by Congress. The court determined, however, that the landowner had validly waived his right to contest the taking of the area below elevation 697.1. Accordingly, the court vested title to the 560 acres below elevation 697.1 in the United States. Title to the 647 acres above elevation 697.1 was vested in the Estate of Sid W. Richardson. The United States appealed from this determination. Disagreeing with the conclusion of the trial court, we are compelled to reverse.

I.

The landowner's first contention is that the government, through the Secretary of the Army, attempted to condemn land for recreation, a purpose not authorized by Congress. The trial court agreed, finding that the land above elevation 697.1 was taken solely for recreation and that recreation was a purpose not authorized by Congress in Public Law 14. The trial court apparently reached this conclusion because it found evidence in the record that the Corps of Engineers had some recreational facilities planned for the area and further found that Richardson's land was not necessary for either the construction or operation of the Benbrook Dam and Reservoir. In other words, the trial court found that the Secretary's stated purpose for the taking—the construction and operation of the project—was not the real purpose for which the land was condemned. The court reached this conclusion by finding that the land was not necessary to achieve that stated purpose. We think that in so finding the court overstepped the bounds of judicial review in condemnation cases.

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[2] The delay was occasioned by the refusal of the Secretary of the Army to submit to certain discovery procedures ordered by the district court. See *United States* v. *Richardson,* 5 Cir. 1953, 204 F.2d 552, where this court refused to review the order of the district court.

The argument that land sought to be condemned is not really necessary for the consummation of a plan is frequently made in condemnation cases in an attempt to defeat the taking. This argument, however, has been unanimously rejected by every court which has considered the matter. It is perfectly clear that the judicial role in examining condemnation cases does not extend to determining whether the land sought is actually necessary for the operation of the project. As the Supreme Court explained in *Berman* v. *Parker,* 1954, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27

> ". . . The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.
>
> "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. See Shoemaker v. United States, 147 US 282, 298, 37 L ed 170,

184, 13 S Ct 361; United States ex rel. Tennessee Valley Authority v. Welch, supra (327 US 554); United States v. Carmack, 329 US 230, 247, 91 L ed 209, 220, 67 S Ct 252.'' 348 U.S. at 35, 36.

This court later made the same observations in *West, Inc.* v. *United States,* 5 Cir. 1967, 374 F. 2d 218, wherein we said:

> ''Appellants here contend that the taking of a fee interest by the United States was without authority when a flowage easement would have sufficed for the purpose intended. This argument is without merit. Provided that land can be reasonably related to a public purpose, the United States, in eminent domain proceedings, is not limited to taking in fee the amount of property which will be physically occupied by the public or actually submerged in a flood control operation. If Congress wanted to dot every *i* and cross every *t* in the pursuit of a legislative command, it would have the power and right to do so; but the courts should only sparingly deny governments an operable orbit to accomplish a legislative end. Numerous cases sustain the proposition that the purpose intended being valid, the necessity of the taking and the character of the title to be taken are decisions vested exclusively in the Secretary. E. g., Berman, supra; Welch, supra; Shoemaker, supra; United States v. Agee, 322 F. 2d 139 (6 Cir. 1963). See also In re United States, 257 F. 2d 844 (5 Cir. 1958).
>
> ''The Supreme Court in Berman, supra, 348 U.S. at 36, 75 S.Ct. at 104, 99 L.Ed. at 39, discussing the Agency's right to take full title to property pursuant to a redevelopment project, concluded that if the Secretary considers it necessary in carrying out the project to take fee title to property involved, it may do so. The Court stressed its opinion that it is not for the judiciary to determine what is necessary for suc-

> cessful consummation of a project any more than it is the court's function to select the precise parcels to be condemned. Compare United States v. 6.74 Acres of Land, etc., 148 F.2d 618 (5 Cir. 1945), holding that the lower court was without right to question the Secretary's action either as to the necessity of taking or as to the extent of the interest in the property taken where, while under lease and in possession of property, the United States condemned fee title thereto." 374 F.2d at 222.

Accord, Shoemaker v. *United States,* 1893, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170; *O'Brien* v. *United States,* 5 Cir. 1968, 392 F.2d 949; *Wilson* v. *United States,* 10 Cir. 1965, 350 F.2d 901; *2,953.5 Acres of Land* v. *United States,* 5 Cir. 1965, 350 F.2d 356; *United States* v. *91.69 Acres of Land,* 4 Cir. 1964, 334 F.2d 229.

The district court attempted to take the present case out of this rule of non-justiciability by characterizing the question as one of purpose rather than necessity. Instead of finding outright that the land was not needed for the stated purpose, the court concluded that the purpose stated by the Secretary of the Army in the declaration of taking was not the real purpose for the taking and that the real purpose, recreation, was unauthorized. We do not think this slight change in terminology is sufficient to convert what is essentially a legislative determination into a judicial question. *United States* v. *Mischke,* 8 Cir. 1961, 285 F.2d 628. In fact, the change in terminology does not disturb the court's basic finding of non-necessity. In order to find that the stated purpose was not the real purpose the court was forced to find that the land was not necessary to achieve that stated purpose. It is clear that this is an inquiry forbidden to the court. *Berman* v. *Parker, supra; West, Inc.* v. *United States, supra.*

The Supreme Court in *Catlin* v. *United States,* 1945, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911, did indicate that a landowner has a right to question the validity of a taking as not being for a *purpose* authorized by the statute under which the proceeding is brought. However, in view of that Court's later characterization of the judicial function in condemnation cases, *Berman* v. *Parker*, *supra,* we can only conclude that the term "purpose" as used by the Court in *Catlin* had a much broader meaning than the landowner here would allow. In *Catlin* the Court must have used the term "purpose" in the sense of the overall project rather than in the sense of some minor part of the project. In other words, we think that if Congress had never authorized a dam on the Clear Fork of the Trinity River, then the landowner might here claim under the *Catlin* rule that his land was being taken for an unauthorized purpose. However, once Congress approved the Benbrook Dam, the taking for any purpose associated with that project was an authorized purpose, and the landowner cannot be heard to complain that the condemnation was not necessary to the dam's construction or operation.

The only exception to this rule would occur if the delegated official so overstepped his authority that no reasonable man could conclude that the land sought to be condemned had some association with the authorized project. In such a case alone could the taking be considered arbitrary or capricious as those terms are used in condemnation proceedings. There must be basic to the project pervasive deception, unreasoned decision, or will-of-the-wisp determination before these words of pejoration are brought into play.

In the present case there is no evidence from which the court could conclude that the land above elevation 697.1 was so disassociated with the Benbrook Dam as to render the taking arbitrary or capricious in this necessary sense. See *United States* v. *Carmack,* 1946, 329 U.S. 230, 67 S.Ct. 252, 91 L.Ed. 209. Aside from the fact that the questioned land was in close proximity to the reservoir and the dam, there was also evidence that if the land were left in the hands of private ownership a safety hazard would be created. In such circumstances the judiciary may not substitute its judgment for that of the Corps of Engineers. There is an administrative assertion by the Secretary of the Army that the land is necessary to the construction and operation of the project. That assertion is not so patently untenable that a reasonable person could not find an association between the project and the land. Once this determination is made the judicial function is ended and the declaration of taking must be sustained.

Judges are expected to be wise in their judicial dispensations and learned in the law, but it must be conceded that they are not hydrographers, reclamation engineers, meteorologists, or informed in the art of geodetics. Congress has wisely committed to the experts their spheres of expertise, in this instance the Corps of Engineers under the supervision of the Secretary of the Army. The court should not and may not interfere with the exercise of the discretion given to these experts. We therefore conclude that it was beyond the judicial power of the district court to inquire into the necessity for taking the area above elevation 697.1. Consequently, the court could not use its finding of non-necessity to support its ultimate conclusion that the taking was solely for recreational purposes and therefore unauthorized.

Moreover, even if the court had been empowered to inquire into the necessity of the taking for the construction and operation of the dam and to deduce a recreational purpose from its finding of non-necessity, we find such conclusion legally irrelevant. Public Law 14 authorizing the construction of Benbrook Dam and Reservoir approved the project for "navigation, flood control and allied purposes." As the Supreme Court has recently noted, it has been government policy since 1944 to build recreational areas in conjunction with federal reservoir projects. *United States v. Reynolds*, 1970, 397 U.S. 14, n.1, 90 S.Ct. 803, 25 L.Ed.2d 12. In Public Law 534, Act of December

22, 1944, Pub. L. No. 78-534, § 4, 57 Stat. 889, Congress provided:

> "The Chief of Engineers, under the supervision of the Secretary of War, is authorized to *construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance and operation of such facilities.* The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: *Provided,* That preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the public interest. The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts." [Emphasis added.]

We conclude that recreational development is an allied purpose within the meaning of Public Law 14 and that the Secretary of the Army was authorized to devote some areas of the Benbrook project to such a purpose. His action in so doing may not therefore invalidate the taking.

II.

The district court held in the alternative that the entire taking was not authorized by Congress and was therefore invalid. Since the landowner did not choose to contest the taking of the 560 acres below elevation 697.1, the result of this determination was identical to the result of the district court's first holding: title to the land above elevation 697.1 was given to the Estate of Sid W. Richardson, and title to the land below elevation 697.1 was awarded to the government.

The district court apparently based its holding that the entire taking was invalid on the fact that the dam as built differed significantly from the plans contained in H. D. 403 which were approved by Public Law 14. Concluding that as a result of these deviations the Benbrook Dam and Reservoir as built was not authorized by Congress, the court held that all of the lands taken for the purpose of building and operating the Benbrook project were taken without authority from Congress and that the entire condemnation was therefore invalid. This was error.

The source of the trial court's misconception is found in the finality and binding effect which it gave H.D. 403. The plans in that document were never intended to be the final plans for the Benbrook project. The cover letter of the document itself states that it is a "*preliminary* examination and survey" (emphasis added). The report of the Chief of Engineers contained in H.D. 403 states that he recommends the project "generally in accordance" with the plans contained in the report "*as modified herein, and with such future modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable*" (emphasis added).[8] The plans in H.D. 403

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[8] The title of the Secretary of War was changed to Secretary of the Army by § 205 of the National Security Act of 1947.

could not therefore have been intended by Congress to be the final plans for the project. The House Document was only a preliminary feasibility report and was not binding on the Corps or the Secretary of the Army. *Thetford* v. *United States*, 10 Cir. 1968, 404 F.2d 301. In fact the evidence shows that it was only after passage of H.D. 403 that the Corps was empowered to make some of the most important tests and surveys to determine the type and size of the dam necessary for the area, and it was almost a year later before a Definite Project Report was submitted by the Corps. The modifications indicated in the Definite Project Report and used by the district court to support its finding of no authorization were changes in design which were considered to be necessary after the final tests and surveys were made.

It has long been the custom of Congress to approve projects of this nature on the basis of such preliminary plans and to authorize the Chief of Engineers to make such modifications as later studies indicate are necessary. In 1946 the House Committee on Rivers & Harbors explained:

> "Similarly, it has been the policy of the Flood Control Committee and the Congress to recognize that changing conditions often make plans obsolete, and to avoid undue rigidity they have given the Secretary of War and the Chief of Engineers the authority to modify plans as may be found necessary and desirable. The committee finds that this confidence and responsibility has been carefully exercised, and that modifications approved by the Chief of Engineers and the Secretary of War are only those which are clearly within the established policies of the Congress." House Committee on Rivers & Harbors, H. R. No. 2165, 79th Cong. 2d Sess. (1946).

In *Ryan* v. *Chicago Z & Q R. Co.*, 7 Cir. 1932, 59 F.2d 137, the court evaluated language almost identical to that used in H.D. 403. The court there held that the Corps of Engineers was authorized to implement dam size modifications which departed from the legislatively approved preliminary plan since Congress had sanctioned "such modification thereof as in the discretion of the Chief of Engineers may be advisable."

We conclude that the Secretary of the Army and the Chief of Engineers were authorized to deviate from the plans in H.D. 403. Therefore the fact that Benbrook Dam and Reservoir as actually built was approximately three miles away from the site suggested in H.D. 403, was considerably larger, and was significantly more costly did not deprive the Secretary of the Army of the authority to build the dam. *United States* v. *Bowman,* 7 Cir. 1966, 367 F.2d 768. It is undisputed that the Congressional authorization was for a flood control project on the Clear Fork of the Trinity River. This is what the Corps of Engineers built. The area served and the project purposes were not changed. The dam is on the Clear Fork and it takes no safari to locate the project when guided by its historiography. The consummated project was vicinal to the original preliminary plans for the Benbrook project. Mere changes in the plans and specifications of the Dam and Reservoir did not render arbitrary and capricious the discretion exercised by the Secretary of the Army and the Chief Engineer pursuant to H. D. 403. Nor did such changes render their actions without authority. In projects of this sort there is a built-in margin for error, leaving room for necessary changes. We hold therefore that the project as built was authorized by Congress in Public Law 14 even though it did not conform exactly to the plans contained in H. D. 403. The condemnation of the entire area involved in the present case was thus authorized by Congress.

The judgment of the district court is reversed, title to the entire 1,207 acres of land is vested in the United States, and the cause is remanded for a determination of just compensation and for other proceedings not inconsistent with this opinion.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28390

D. C. Docket No. CA 2025

UNITED STATES OF AMERICA, *Plaintiff-Appellant*,
versus
2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS, and
FRANK CORN, ET AL, *Defendants-Appellees.*

Appeal from the United States District Court for the
Northern District of Texas

Before GEWIN, GOLDBERG and SIMPSON,
Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for a determination of just compensation and for other proceedings not inconsistent with the opinion of this Court.

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

October 16, 1970

Issued As Mandate:

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28390

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

versus

2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS, and
FRANK CORN, ET AL, *Defendants-Appellees.*

Appeal from the United States District Court for the
Northern District of Texas

(November 9, 1970)

On Petition for Rehearing

Before GEWIN, GOLDBERG and SIMPSON,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 5 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 1316

2,606.84 Acres of Land in Tarrant County, Texas, and Frank Corn, et al., *Petitioners,*

v.

United States of America, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS,
and FRANK CORN, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Perry R. Bass, John B. Connally and Howell E. Smith, executors of the Estate of S. W. Richardson, Deceased (the original condemnee), respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgment reversing the judgment of the United States District Court for the Northern District of Texas in favor of Petitioners.

CITATIONS TO OPINIONS BELOW

The District Court's opinion is reported at 309 F. Supp. 887 and is attached as Appendix B.[1] The District Court's Findings of Fact and Conclusions of Law, Petitioners' Motion for Amendments and Additions of Findings, and the District Court's Order on that Motion are all unreported but are attached as Appendix C. The District Court's Judgment is unreported but attached as Appendix D.

The opinion of the Fifth Circuit Court of Appeals is reported at 432 F.2d 1286 and is attached as Appendix E, its Judgment is attached as Appendix F, and its order denying a Petition for Rehearing is attached as Appendix G.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 16, 1970 (App. F). A timely Petition for Rehearing was filed on October 30, 1970, and was denied by order of November 9, 1970 (App. G.). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Was it not a denial of due process under the Fifth Amendment for the United States to condemn a portion of petitioner's land for the purpose of creating a recreational area when (a) the governing statute authorized "navigation, flood control, and allied purposes" and not a taking for recreation; (b) the Corps of Engineers deliberately kept its recreational purpose secret, even to the point of changing descriptive phrases so as to hide the true nature of the taking; (c)

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[1] All Appendices have been printed under separate cover.

the Corps resisted discovery for thirteen years in order to prevent the purpose of the condemnation from being revealed, and (d) a number of additional steps were taken to mislead the public and the court as to the true purpose of the condemnation?

2. (a) Is a District Court precluded from finding that the true purpose of a condemnation is one outside the statutory authority when the record shows what the actual purpose was and that it was not authorized by the governing statute?

(b) Can the Secretary of the Army's certification of the purpose of condemnation be used by the Government as an impenetrable shield to deny the landowner the opportunity to show that his constitutional right of due process is being violated by an unauthorized taking of his land?

3. Even if a landowner must show "pervasive deception, unreasoned decision, or will-of-the-wisp determination" on the part of the condemning authority, was not this test met where, as the District Court found, the Corps of Engineers concealed the facts, changed facts for public consumption, made recommendations "tainted by * * * impropriety," misstated the real purpose of its action, and otherwise acted in an arbitrary and capricious manner in excess of its authority?

4. Under the facts of this case, was not the project as built so radically different from the one authorized by Congress in location, cost, size, construction, specifications and design as to be an unauthorized project?

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution, Public Law 14 (Act of March 2, 1945, Pub. L. No. 79-14, § 2, 59 Stat. 10), and 33 U.S.C. §§ 701, 701b-4, 701b-8 and 701m are attached as Appendix A.

STATEMENT

This case represents a long and disgraceful chapter in the history of land condemnation by the Corps of Engineers.

S. W. Richardson[2] was the owner of approximately 2,259 acres of land in Tarrant County, Texas, when the Corps of Engineers began a series of surveys in 1920 to determine the feasibility of constructing and operating a dam and reservoir on his property. Six preliminary surveys followed—in 1920, 1926, 1927, 1932, 1935 and 1937—and these culminated in the Project Document of November 15, 1939, which was printed as House Document 403, 77th Congress, 1st Session (1940). The Document recommended, among other projects, the Benbrook Dam and Reservoir to be built on a small part (only 48 acres) of Mr. Richardson's land at an estimated cost of $5,205,502 (of which $483,600 was to be for land). *Neither the six survey reports, the Project Document, nor Document 403 contained any reference to recreation or recreational facilities in relation to the project.*

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[2] Mr. Richardson has since died. Petitioners, his executors, were substituted as Parties Defendants.

On March 2, 1945, Congress approved Public Law 14 (Pub. L. No. 79-14, § 2, 59 Stat. 10, App. A hereto), which provided in pertinent part:

> "Sec. 2. The following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized in the interest of national security and the stabilization of employment, and shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and supervision of the Chief of Engineers, *in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein:*
>
> * * *
>
> The improvement of the Trinity River and tributaries, Texas, for navigation, flood control, and allied purposes is hereby approved and authorized *in accordance with the reports contained in House Document Numbered 403, Seventy-seventh Congress* * * *. [Emphasis added.]

On July 28, 1950, the United States filed in the United States District Court for the Northern District of Texas a Petition for Condemnation of 1452 acres of Mr. Richardson's land (subsequently reduced to 1207 acres, each modified taking being successively certified by the Secretary of the Army as necessary and authorized for project purposes). The subsequently filed "Declaration of Taking No. 1" was executed by then Secretary of the Army Frank Pace, Jr., and stated that the taking was authorized by Public Law 14. The United States sought not only the acres lying below el. 697.1 (or the conservation pool elevation, sometimes described as the maximum water level of the pool below flood stage) but also 647 acres above this elevation.

Mr. Richardson was not opposed to the taking below the conservation pool elevation (in fact, he offered to make a gift of that land to the United States[3]), but he did contest the Government's right to condemn the 647 acres above that elevation as unauthorized by law, arbitrary and capricious, and a denial of due process of law under the Fifth Amendment. His two principal objections that evolved out of the extended litigation that followed were: (1) the 647 acres were actually being taken for recreational use, which was not a purpose for which private property had been or could be condemned under the statutes authorizing the Benbrook Project, and (2) the Project, as built, was radically and materially changed from that authorized by Congress and had not been resubmitted to Congress as required by express statute.

After the filing of the Petition for Condemnation, Mr. Richardson instituted discovery proceedings in order to establish that the Corps of Engineers had deviated from and exceeded Congressional authority in the construction of the Dam and Reservoir and was seizing land surrounding the reservoir for unauthorized purposes. In another case, *United States* v. *Meyer,* 113 F.2d 387 (7th Cir.), *cert. denied,* 311 U.S. 706 (1940), the court had held that presumptively the Secretary of the Army and not his subordinates, even the Chief of Engineers, had made the necessary determinations underlying a condemnation. This presumption could be overturned only by taking the Secretary's deposition to discover whether or not he had in fact made the determinations himself or whether he had relied completely on his subordinates.

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[3] Finding of Fact by the District Court (App. C) (hereinafter referred to as "DC Find.") No. 52.

Upon the advice of the Justice Department (obviously because of *Meyer*), Secretary Pace refused to give his deposition or submit to discovery, despite an order of the District Court and a prior agreement to do so. Therefore, the District Court, on June 30, 1952, abated the cause with bare legal title left in the Government and possession restored to Mr. Richardson pending the Government's obedience to the court's orders. The Court of Appeals for the Fifth Circuit affirmed this action. *United States* v. *Richardson,* 204 F.2d 552 (1953).

Over ten years passed. Finally, when a prior Motion to Dismiss was reurged and Secretary Pace was replaced by Secretary Robert L. Stevens, the Government relented and submitted to discovery, including the depositions of former Secretary Pace and three members of his Corps of Engineers staff, and the production of a large amount of materials.

With these depositions and materials came the reasons, so reluctantly produced, why the Government had delayed and fought so long to prevent public access to its records. For discovery showed, as General Sturgis, Chief of the Corps, admitted to a congressional subcommittee, that "it could have been very embarrassing to have justified his [Secretary Pace's] certification of the public need of all this particular taking."[4]

As subsequently found by the District Court, disclosed in congressional hearings, or revealed by evidence of record, the facts that emerged were, briefly, these:

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[4] "Army-Interior Reservoir Land Acquisition Policy," Hearings before a House Subcommittee of the Committee on Government Operations, 85th Cong., 1st Sess. (1957) (hereinafter referred to as "Acquisition Policy Hearings"), p. 422. These hearings were admitted into evidence below at Vol. III, Transcript of Trial Proceedings, pp. 748, 756.

(a) The Corps had a "field practice" prior to 1953 of taking more property than was authorized in order to create land for purely recreational purposes. The Corps did not acknowledge this fact to the public, however, until 1957. Instead, it always stated the proposed use in terms of the use authorized by Congress.[5] This was because the Corps had no authority at that time to acquire lands for recreational purposes.[6]

(b) In the instant case, despite the fact that Public Law 14 had authorized the Benbrook Project solely for "navigation, flood control, and allied purposes," the Corps within several months began drawing up secret plans for the taking of part of Mr. Richardson's land solely for recreational purposes.[7] A letter dated July 11, 1946, for example, recommended "a master plan for recreational development at the Benbrook Reservoir * * * ." This letter became Appendix VIII-E to the Definite Project Report but was the *only* Appendix stamped by the Corps "NOT FOR PUBLIC RELEASE."[8] The record contains instructions to subordinates as to how to go about acquiring land for recreational purposes; descriptions of what recreational facilities would be provided (*e.g.*, "swimming, boating, camping, picnicking"); justifications for increased costs based on "recreational development"; a letter stating that "the Corps of Engineers' plans would provide adequate public recreational areas" and that the "presently approved taking lines provide sufficient land to meet reasonable demands for recreational as well as other purposes," and numerous maps with certain areas clearly marked as recreational areas. The extent to which the Corps went to hide its true purpose is illustrated by the fact that an allocation of funds "for recreation" was deliberately changed to "preparation of master plan for reservoir management."[9] In fact, several such changes were made. One memorandum (June 6, 1950), which was referred to in a Corps letter (DX54) and which apparently bore on the subject of recreation, never was produced during discovery, the Corps claiming to have lost it.

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[5] Acquisition Policy Hearings, *supra* n. 4 at 62, 126-129, 155-156.

[6] *Id.* at 55, 57, 68, 129, 193.

[7] DC Find. No. 36.

[8] DC Find. Nos. 37, 41.

(c) As the District Court found, recreational use was in fact the actual and only purpose of taking the land above el. 697.1 (DC Find. Nos. 39 and 56).

(d) Former Secretary Pace conceded and the District Court found that the then Secretary made no independent examination of the facts submitted to him prior to forwarding a request for condemnation (written by the Corps) to the Attorney General but instead relied entirely on those facts and accepted the Corps' recommendations without question.[10]

(e) As the District Court found (DC Find. No. 3), the Government's refusal to submit to discovery for thirteen years "was for the purpose of keeping the landowner from getting proof that the only true purpose of taking the fee simple title to the portion of

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[9] DC Find. No. 42.

[10] DC Find. Nos. 6-9; Conclusion of Law of the District Court (hereinafter referred to as "DC Con.") No. 4.

Tract B-108 above the 697.1 line was for public recreation."

(f) This "field practice" of taking more property than authorized for recreational purposes, as described in Paragraph (a) above, was specifically recognized and officially changed by Secretary of the Army Stevens in 1953 as a result of the condemnation in this very case.[11] General Sturgis testified before a congressional committee in 1957 that the reason for the change was that "there is no general authority for the Corps of Engineers to acquire land other than for basic project purposes (navigation, flood control, etc.) and access for the public." [12]

Despite all of these facts, subsequently confirmed by undisputed findings, the Government's attorney told the District Court in this case:

> I would like to correct one impression, if I left any impression with the Court that the Court might assume I said that they were acquiring some of this land for recreational purposes, I didn't mean to say that. *There is no plan for it to be used for recreational purposes.* That is not set out. The only thing they have said here is the purpose as alleged in the petition, for flood control, and to aid navigation.[13]

Little wonder that the District Court found that the Government withheld facts and acted in an arbitrary and capricious manner.[14]

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[11] Acquisition Policy Hearings, *supra* n. 4 at 126-129.

[12] *Id.* at 425.

[13] Transcript of Record filed in the Fifth Circuit on appeal from the order abating prosecution of Tract B-108 (hereinafter referred to as "Tr."), pp. 155-156 (emphasis added).

[14] 309 F.Supp. at 895; DC Find. No. 35.

The project actually built by the Corps differed radically from that approved by Congress. The dam was located 3.7 miles away from the approved site; the spillway was converted from gated to uncontrolled; the crest was changed from 672 feet to 724 feet; the top of the dam was raised by 47 feet; dead storage rose from 603 to 13,760 feet; conservation storage climbed from 30,000 to 72,000 feet; controlled storage almost doubled; and the estimated cost rose from $5,205,502 to between $14,000,000 and $16,000,000. The storm design was changed from one based on actual experience to one based on "the worst possible maximum storm that could ever occur under the worst possible situations * * * " and assumed that the reservoir would already be full to el. 710 with the outlet valve closed and inoperative (DC Find. No. 25(d); see also DC Find. Nos. 14, 18-35).

The District Court, at the conclusion of a trial without a jury, made extensive Findings of Fact and Conclusions of Law (App. C). Its ultimate conclusions, *inter alia,* were that Mr. Richardson's land above el. 697.1 had been taken for the purpose of recreation, that this purpose had not been authorized by Congress, that in addition the project actually built was so substantially different from that authorized by Congress as to be an unauthorized project, and that the taking amounted to a denial of due process.

The Court of Appeals reversed, holding that the District Court had made a determination reserved to the Congress and that the changes in the project were mere changes in design which the Corps had authority to make. However, the court did *not* find that the District Court's findings were clearly erroneous or without a substantial basis in the record.

REASONS FOR GRANTING THE WRIT

A.

The Court of Appeals for the Fifth Circuit has fashioned a new rule in condemnation cases which not only conflicts with prior rulings of this Court and other Courts of Appeals but deprives landowners of an important Fifth Amendment right.

The District Court in its Conclusions of Law Numbers 2 and 3 (App. C) clearly stated the rule under which it was deciding the case:

> 2.
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> Under the circumstances of this case, the Secretary's stated purpose of the taking is subject to judicial review to determine if it was in truth the actual purpose.
>
> 3.
>
> The Secretary's certification of the purpose of taking cannot be used by the government as an impenetrable shield to deprive the landowner of the opportunity to show that his constitutional right of due process under the Fifth Amendment to the Constitution of the United States was being violated by an unauthorized taking of his land.

The Court of Appeals rejected this rule. It held instead that absent "pervasive deception, unreasoned decision, or will-of-the-wisp determination" by the condemning government official, a court has no authority to look behind the stated purpose of condemnation. This is so even in a case where the record clearly shows that the real purpose of condemnation was not the stated purpose and the real purpose was not authorized by the governing statute. As we point out below, the condemnation in this case fails even if this rule were the law, because the District Court's uncontested findings fully support the conclusion that the Corps of Engineers (and consequently the Secretary of the Army, who "merely accepted their recommendations without making any reasoned decisions of his own"[15]) did engage in pervasive deception, unreasoned decision and will-of-the-wisp determinations. We submit, however, that the rule announced by the Court of Appeals is not the correct rule and violates petitioners' right under the Fifth Amendment to due process of law.

It should be noted initially that the ruling below comes at a highly significant time in the evolving law of condemnation. In 1956, the Federal Government owned about 408 million acres, or 21.4%, of the country's 1.9 billion acres.[16] In 1970, the Government owned about 755 million acres out of 2.2 billion, or 34.3%.[17] The Corps of Engineers alone administers 7,148,150 acres.[18] In 1970, the Department of Justice opened 556 new condemnation cases (an increase of 29 in three years) involving 8,598 tracts and 122,011 acres, and it also opened 17,075 new tracts for direct purchase involving 284,067 acres.[19] The cost of its condemnations and direct purchases in that single year was $162,616,556.[20] Thus, the issues presented here are not only constantly recurring ones but ones of great national importance, for they affect thousands of landowners and the use to which millions of acres of this country's lands will be put.

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[15] DC Find. No. 6; see also DC Find. Nos. 7-9.

[16] Acquisition Policy Hearings, *supra* n. 4 at 148.

[17] "One Third of the Nation's Land," A Report to the President and to the Congress by the Public Land Law Review Commission (1970) (hereinafter referred to as "Commission Report"), p. x. The Report adds: "The huge expanse of the public lands of the Far West is difficult for many to comprehend. * * * More than 86 percent of the State of Nevada is owned by the Federal Government, and the public land area in that state is twice the size of the entire State of New York. * * * Minnesota, for example, has Federal public lands which exceed the area of Connecticut. In addition, there are 10 other nonwestern states in each of which the public landholdings of the Federal Government approximate or exceed the land area of the State of Delaware" (p. 22; footnote deleted).

[18] Commission Report, *supra* n. 17 at 329.

Moreover, when a government body acts as the Corps of Engineers has acted here, people are bound to lose faith in those in authority. We submit that this is hardly the time for ignoring the District Court's findings that the Corps, "in its zeal to acquire excess lands for recreational use," [21] concealed the facts,[22] changed facts for public consumption,[23] made recommendations "tainted by * * * impropriety," [24] misstated the real purpose of its action,[25] and otherwise acted in an arbitrary and capricious manner[26] in excess of its authority.[27] The fact is that the Corps' over-reaching, inefficiency, poor planning and excessive costs have in part been exposed by the Congress and are widely recognized by the public.[28] It is time for this Court to declare the role of the judiciary in putting a stop to unlawful condemnations that deny due process.

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[19] Memorandum from Harold S. Harrison, Chief of Land Acquisitions Section, Department of Justice, to Assistant Attorney General Kashiwa dated January 11, 1971.

[20] *Ibid.*

[21] DC Find. No. 46.

[22] 309 F.Supp. at 895; DC Find. Nos. 37, 41.

[23] 309 F.Supp. at 896; DC Find. No. 42.

[24] DC Con. No. 4.

[25] 309 F. Supp. at 902.

[26] DC Find. No. 35.

[27] DC Con. No. 5.

Under the Court of Appeals ruling, the District Court would have had to ignore the unequivocal, uncontested

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[28] Even the head of the Corps recognized at one point that "In response to operational instruction No. 14, my Real Estate Division, by memorandum dated May 13, 1953, of which the subcommittee has a copy, expressed the view that the corps was acquiring excessive amounts of land as evidenced by numerous protests which I have mentioned." Acquisition Policy Hearings, *supra* n. 4 at 128.

One study of all river-and-harbor and flood control projects under construction by the Corps in fiscal 1951 showed that the Corps' preliminary planning reports "did not furnish a sound basis upon which the appropriation of initial construction funds could be considered by Congress," that "A private owner could not tolerate such lack of engineering reliability without inviting bankruptcy," that "the corps' engineering planning procedures are drastically in need of overhauling and improvement before the corps should again ask Congress to commit itself to the construction of any new projects," and that "the planning of authorized projects by the Corps of Engineers, subsequent to the preliminary planning embodied in the survey report, is not adequate." "Investigation of Corps of Engineers Civil Works Program," Report of the House Subcommittee on Deficiencies and Army Civil Functions of the Committee on Appropriations, 82nd Cong., 1st Sess. (1951) (hereinafter "Investigation of Corps Report"), pp. 2, 7, 14, 15.

A more recent Report to the President and the Congress found: "The Commission is not satisfied with the manner in which land use planning is being carried out for the public lands. We find that many of the individual problems that led to the creation of this Commission and which emerged from our study program have their roots in an inadequate planning process. * * * We discovered problems caused by the lack of coordination between public land agencies in nearly every aspect of public land policy that we reviewed. Finally, we are concerned by the fact that the relative roles of Congress and the executive branch have not been clearly defined in determining land uses. The essence of land use plan-evidence in the record as to the true purpose of the taking and to assume—squarely in the face of that evidence—that the purpose was *not* for recreation but rather whatever the Secretary said it was. We submit that it would amount to a subversion of justice for a court, on the basis of the record here, to make such a finding.

Moreover, the law does not require it. In *Catlin* v. *United States,* 324 U.S. 229 (1945), the condemnee argued that "the taking was not for a reason authorized by the War Purposes Act." In construing the provisions of 40 U.S.C. § 258a, which provides that upon the filing of a declaration of taking and a deposit, "title * * * shall vest in the United States * * * and said lands shall be deemed to be condemned and taken for the use of the United States", this Court said:

> The exact effect of these provisions is not entirely clear. *But we find nothing in the statute to indicate that Congress intended to deprive the owner of all opportunity to challenge the validity of the taking for departure from the statutory limits.*
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> * * *
>
> While the language and the wording of the act are not wholly free from doubt, we see no necessary inconsistency between the provisions for transfer of title upon filing of the declaration and making of the deposit and at the same time preserving the

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ning is found in the classification or zoning of lands for particular uses. Congress has, in many cases, set aside large areas of public lands for parks or for other purposes. But the administering agencies also determine or limit land uses through withdrawals and land classifications. We believe that the roles of both Congress and the administrative agencies must be more clearly defined so that the limits of the discretionary powers are understood by the administrators and the public" (Commission Report, *supra* n. 17 at 41, 42). See also "Dam Outrage: The Story of the Army Engineers," by Elizabeth B. Drew, The Atlantic Magazine (April 1970).

> owner's *preexisting right to question the validity of the taking as not being for a purpose authorized by the statute under which the main proceeding is brought* * * * . The alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity or one for which the only remedy would be to accept the compensation which would be just if the taking were valid, would raise serious question concerning the statute's validity.
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> * * *
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> * * * The operation of §§ 3 and 5 is to cut off the Government's right to abandon the proceedings. It is not to compel the owner to submit to *unauthorized takings.* [324 U.S. at 240-243; emphasis added.[29]]

Both the Sixth Circuit and District of Columbia Circuit Courts of Appeals have followed the *Catlin* rule and held that a landowner can challenge a taking as not being for the prescribed statutory purpose,[30] so that the Fifth Circuit, by its ruling below, is in conflict with these other two circuits. (A number of District Courts have allowed similar challenges.[31]) A landowner can hardly "question the validity of the taking as not being for a purpose authorized by the statute," as this Court said in *Catlin* that he could do, if he is not allowed to inquire into what the purpose of the taking was.

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[29] Respondent and the Fifth Circuit relied on *Berman* v. *Parker,* 348 U.S. 26 (1954), but that case is inapposite. No one contended there that the action by the Planning Commission in fixing the boundaries of the projects area was unauthorized, arbitrary or capricious. The sole attack was on the constitutionality of the authorizing statute. This Court held that Congress had legitimately made a determination that it was necessary to develop a plan for all of the District of Columbia and surrounding areas and had authorized the Planning Commission to determine (subject to certain conditions) which parts had to be taken for the legislative purpose. This Court should clearly distinguish the broad and unlimited congressional authorizations involved in *Berman* and such cases as *United States ex rel. T.V.A.* v. *Welch,* 327 U.S. 546 (1946), with the limited authority spelled out in statutes such as Public Law 14.

[30] *Higginson* v. *United States,* 384 F.2d 504, 507 (6th Cir. 1967); *Maiatico* v. *United States,* 302 F.2d 880, 886 (D.C. Cir. 1962). See also *Loughran* v. *United States,* 317 F.2d 896, 898-899 (D.C. Cir.

The Fifth Circuit correctly stated that if Congress has declared a particular condemnation to be necessary, it is improper for a court to strike down the condemnation because in the court's eyes the condemnation is not necessary. But then the court proceeded to equate this rule with its own rule that courts cannot look behind a stated purpose to determine if it is in fact the true purpose. We believe that the court below made this error because of its assumption that "In order to find that the stated purpose was not the real purpose the [District Court] was forced to find that the land was

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1963). In *Maiatico,* for example, the landowner challenged the Government's right to take a building on the ground that the building was not within the taking area defined in the Public Buildings Act, and the taking had not been approved by the proper congressional committee. The Government countered in part that subsequent Appropriation Acts were sufficient approval of the taking. The Court of Appeals rejected this contention and allowed the landowner to test whether the taking was within the prescribed authority.

[31] *E.g., United States* v. *Three Parcels of Land,* 224 F.Supp. 873, 876 (D. Alaska 1963); *United States* v. *10.47 Acres of Land,* 218 F.Supp. 730, 733 (D. N.H. 1962); *United States* v. *44.00 Acres of Land,* 110 F.Supp. 168, 171 (W.D. N.Y. 1953); *United States* v. *40.75 Acres of Land,* 76 F.Supp. 239, 241 (N.D. Ill. 1948); *United States* v. *Woodworth,* 66 F.Supp. 641, 644 (W.D. N.Y. 1946); *United States* v. *Certain Parcels of Land,* 61 F.Supp. 164, 169 (D. Md. 1945).

not necessary to achieve that stated purpose." On the contrary, the District Court, in finding that the taking of land above el. 697.1 was unnecessary, was merely bolstering its conclusion, already well established by the record, that the purpose of the taking was not the one asserted by the Corps of Engineers.[32] Even if we were to assume that all of the District Court's findings in regard to necessity were improper and should be ignored, there remains ample, uncontradicted evidence in the record as to what the purpose of the taking was, and this evidence has nothing to do with, and is not dependent upon, any findings relating to necessity.

Here the Congress set forth the purpose of the taking, and the Government was bound by that direction.[33] The purpose was "for navigation, flood control, and allied purposes."[34] The record shows that the true purpose of the taking was for recreation. Is the judiciary powerless to recognize the unauthorized taking? Despite what we believe to be the clear answer set forth in *Catlin,* there is obviously confusion on the point in some jurisdictions—a confusion that will be compounded if the opinion below is allowed to stand. In fact, any doubt about the need for this Court to clarify the role of the judiciary is laid to rest by the various, conflicting and confusing positions taken by the Government itself in this very case.[35]

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[32] This conclusion is supported by the fact that the District Court itself quoted with approval the holding in *Maiatico* v. *United States, supra,* 302 F.2d at 886, that "Despite appellants' allegations that the taking is unnecessary, it is not for us to determine whether or not a particular project be desirable". See 309 F.Supp. at 900.

Petitioner's attorney had made it quite clear at oral argument in the discovery proceedings before the District Court what he was attempting to show: "* * * I am entitled to a finding before a court or jury as to what the true purpose is. If that purpose is unauthorized, I am entitled to show as a fact that they are not taking the land in connection with the overflow, or anything else, except to put it to an unauthorized purpose, a wholly unauthorized purpose. It is not a question of a dual purpose, it is a question of an unauthorized purpose, and that is, in itself one of the elements of arbitrary and capricious action. It is not the only one." (Tr. 200).

[33] *Hooe* v. *United States,* 218 U.S. 322, 335-336 (1910); *United States* v. *Certain Real Estate,* 217 F.2d 920, 925 (6th Cir. 1954); Investigation of Corps Report, *supra* n. 28 at 4.

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[34] Certainly the phrase "allied purposes" cannot be used to cover recreation. Long prior to 1944, Congress authorized projects, such as Benbrook, for "flood control and allied purposes." As an example, Public Law 228, 77th Cong., 1st Sess., 1941, authorized certain propects "for flood control and allied purposes." Yet, not until Public Law 534 (78th Cong., 2d Sess. 1944) did Congress authorize recreation at any project. Obviously, therefore, the term "allied purposes" does not encompass recreational development. Nor did Public Law 534 authorize takings for recreational development at Benbrook. As shown by "Authorization for Reservoirs, Levees, and Flood Walls for Flood Control," Report No. 1309, Committee on Flood Control, 78th Cong., 2d Sess. (1944), pp 6-7, that Act gave authority for the expenditure of funds for recreational development at forty-two reservoir areas *already owned by the Government.* The Committee recognized that prior to this Act there was no authority for the Secretary to expend funds at reservoirs for recreational development. *Ibid.* Thus, recreational development was so foreign to the authorized purpose of flood control as to require an act of Congress to permit the Secretary even to devote money to reservoir areas *already owned* by the Government for such purposes.

[35] For example:

> The legislative and administrative determination of the necessity of the acquisition is not subject to judicial review in the absence of arbitrariness, capriciousness or abuse of discretion, and the mere filing of a petition for condemnation is sufficient indication of administrative finding of necessity [Objections

B

We argue above that the judiciary is allowed to test whether the true purpose of the taking is the same as the authorized purpose. Even if the Court were not

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of the United States to Defendant's Request for Admissions, Tr. 106.]

* * *

As will be shown, the relief for unwise or unreasoned (or for that matter arbitrary, capricious or bad faith) actions of a delegated agent of the Government in taking land is not judicial but political. [Memorandum in Opposition to Defendant's Motion Reurging Dismissal in the District Court, p. 5; footnote deleted.]

* * *

Some lower courts have, *in dictum,* asserted a limited power of judicial review, phrased in terms of determining whether the administrative official acted in "bad faith" or "arbitrarily or capriciously." In truth, Government counsel, in earlier cases as here, *have more or less conceded* a limited exception, no doubt secure in the thought that no bad faith could be shown. [Memorandum Opposing Defendants Motion Reurging Dismissal in the District Court, p. 11; emphasis added.]

* * *

* * * [T]he only issue in an eminent domain proceeding is just compensation. [Objections of the United States to Defendant's Request for Admissions, Tr. 103.]

* * *

2. The facts suggested for findings do not lay a foundation or constitute evidence for a finding of bad faith conduct on the part of the Secretary, should such a finding become material which is denied. [Plaintiff's Objections to Defendant's Findings of Fact and Conclusions of Law in the District Court, p. 1.]

* * *

Mr. Harris [representing the United States]: If the action was arbitrary and capricious, it is my opinion, under the decision * * * [i]t is for the Court.

The Court: Does that become a matter for the courts?

Mr. Harris: They have left that open for the courts.

The Court: All right.

Mr. Harris: If the action is arbitrary. [Oral argument before the District Court in the discovery proceedings, Tr. 294-295.]

to accept that view, however, and even if the rule adopted by the Fifth Circuit prevails, the taking in this case cannot be justified. It makes no difference whether the test is "pervasive deception, unreasoned decision, or will-of-the-wisp determination", as concluded by the Fifth Circuit, or "arbitrariness, capriciousness or abuse of discretion," as sometimes argued by the Government to the District Court, the test is met in this case. The District Court found all of these elements, the record fully justifies its findings, the Government has never contested them, and simple justice requires that they be heeded.

If the Government can be allowed to act as it has here—telling the court one thing when its own records show the opposite, changing documents for public consumption or refusing to release them at all, misstating the facts, and so on—then the Court of Appeals references to such tactics as "pervasive deception" are empty rhetoric.

C

The project actually built was unauthorized for still another reason.

The radical changes between the project described in House Document 403 and approved by Congress and the project actually built have been set forth in our Statement, *supra*. The total cost, by way of example, tripled between the Document and the construction. While the Corps has been notorious for its poor planning and dramatic cost escalations,[36] the Benbrook

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[36] "The Garrison project was authorized in the 1944 Flood Control Act on an authorization estimate of $105 million. That authorization estimate was predicated upon a survey report which, under the statute, was formally written by the Corps of Engineers, referred to the Board of Engineers for Rivers and Harbors, filed by

Project was an unusual one even for the Corps. Congress subsequently found that by fiscal 1952, for example, the estimated cost of relocation alone on the project had risen from \$35,992 to \$1,778,000—or by 4,839%—the highest percentage increase of any project studied.[37]

The Corps has admitted outside of this case that it must go back to Congress if anything other than inconsequential modifications or changes are made.[38] Yet it has insisted below that the study embodied in House Document 403 was merely a preliminary report which could thereafter be changed in the way it was here. This simply is not a fact, as the District Court found.[39]

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the Secretary of the Army with the Congress and printed. The authorization estimate in the survey report is \$105 million. The estimate for fiscal year 1952 is \$268 million, which is over twice as much as the authorization estimate." Investigation of Corps of Engineers Civil Works Program, Hearings before the House Subcommittee of the Committee on Appropriations, 82nd Congress, 1st Sess. (1951) (hereinafter referred to as "Investigation of Corps Hearings"), Part I, p. 11. In another project, the difference between the amount authorized by Congress, based on the Corps' survey report, was \$163,000,000—almost \$18,000,000 of which was accounted for by "items, which were omitted but should have been included by the estimator as distinguished from those which could not have been foreseen" (*id.* at 12). In still another project, "with the relocation program only 1 percent complete, the estimate in the survey report was 3,396 percent off" (*id.* at 26). Charts were introduced showing that costs for all projects in that year were 124 percent over the authorization estimate—from \$2.6 billion to \$5.9 billion (*id.* at 15-18).

[37] Investigation of Corps Hearings, *supra* n. 36, Part I, pp. 27-30.

[38] Investigation of Corps Hearings, *supra* n. 36, Part II, pp. 137-138; "Supplemental Hearings on the Civil Functions, Department of the Army, Appropriations for 1951," Senate Hearings before the Subcommittee of the Committee on Appropriations, 81st Cong., 2d Sess. (1951), p. 35.

[39] DC Find. Nos. 12, 13.

The District Engineer had already submitted six *preliminary* examination reports, and after the last of these he was directed to make a *survey* report (House Document 403, p. 11, par. 2). The resulting report was in fact made up of detailed analyses by the District Engineer, the Division Engineer, the Board of Engineers, and the Chief of Engineers.[40]

Congress authorized the construction of Benbrook "* * * in accordance with the plans in" House Document 403. Any construction of this direction except the one we urge would nullify the expressed policy of Congress that "no * * * modification not authorized, of a project * * * shall be authorized * * * unless a report for such * * * modification has been previously submitted by the Chief of Engineers * * * in conformity with existing law" (33 U.S.C. § 701b-8); would ignore the provisions of 33 U.S.C. § 701m, authorizing the Chief of Engineers to make a dam smaller "on the chosen site" but not larger; and would defeat the plain intent of Congress in requiring reports for projects or modifications to cover, among other things, "the extent and character of the area to be affected" (33

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[40] The District Engineer's report alone comprised 136 pages, plus numerous plans, drawings and specifications, and contained in minute detail data covering the location of the dam, geography, topography, geology, soils, streams, population, industries and resources, general hydrology, improvements desired by local interests, existing improvements, flood damages, plan of improvements, power, irrigation, stream pollution, relationship of the program of the Department of Agriculture to the District Engineer's proposed plan, conclusions and recommendations. The report contained a detailed economic cost/benefit ratio based upon structural design criteria for Benbrook Dam and Reservoir, including among other things, its specific location, type of construction, capacity, acreage needed and cost, cost of construction and cost of relocations of improvements.

U.S.C. § 701). The Court of Appeals neither cited nor discussed these statutory provisions. Yet absent compliance with the policies of Congress set out in these provisions, how would Congress ever have any assurance that projects or modifications are practical or economically feasible?

CONCLUSION

Petitioners do not oppose a proper, authorized taking of land for purposes of recreation. But the mere fact that recreation is to be the end use of the land does not automatically confer an exalted status upon the taking. On the contrary, a recent Report to the President and the Congress stressed that recreation policies and programs on public lands of less than national significance can be handled at the state and local level better than by the Federal Government; that some areas are being destroyed by the concentrated use, carelessness and littering associated with recreation (*e.g.,* "Motorcycle racing can grind a desert range to pulp"); that recreation use requires added police protection which federal authorities sometimes cannot provide, and other factors militating against federal control of recreation areas.[41]

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[41] Commission Report, *supra* n. 17 at 5, 199, 207, 208, 213, 215, 268-269. The Commission pointed out that it is important to keep acquisitions of land within reason "to avoid unnecessary (1) reduction of the available tax base for state and local government; (2) preemption of lands suitable for generating economic activity for non-economic purposes (recreation areas, fish and wildlife refuges, etc.); (3) disruption of existing economic activity and dislocation of residents." *Id.* at 270.

It is not without significance that on January 20, 1971, President Nixon halted further construction of the cross-Florida barge canal because it had been planned without regard to natural, ecological values.

Thus, petitioners are not opposed to recreation; they *are* opposed to secret, ill-conceived plans for recreation without proper consideration by and authority from the Congress.[42] Yet if the rule announced by the Court of Appeals in this case is adopted, the Corps, by the simple device of obtaining a declaration from whomever the Attorney General delegates[43] that the purpose of the taking is the same purpose declared by Congress, will cut off all judicial inquiry into what the Corps really has in mind for the land to be acquired. The courts will blindly have to accept such a declaration even in the face of a record like this one, where the true purpose is established. Though the record in this case goes back over twenty years, the rule announced by the Court of Appeals is new, and as noted below (n. 43), its impact will be even more far-reaching for the future than it would have been for the past.

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[42] In this respect, we stand four-square with Secretary Stevens when in 1953 he reversed the "field practice" of taking unauthorized land for recreational purposes. General Sturgis' notes of a meeting with the Secretary stated that the Secretary "said he was not personally against recreation for the public or the acquisition for fish and wildlife, or any other purpose for the public good; but if such purposes were the intent of Congress, Congress should so express itself by general authorizing legislation." Acquisition Policy Hearings, *supra* n. 4 at 423.

[43] Under a newly-enacted statute, public money may not be expended for land purchases unless the Attorney General "gives prior written approval of the sufficiency of the title to land for the purpose for which the property is being acquired by the United States," but the Act then goes on to provide that "The Attorney General may delegate his responsibility under this section *to other departments and agencies,* subject to his general supervision and in accordance with regulations promulgated by him." Public Law 91-393, 91st Cong., Sept. 1, 1970, 84 Stat. 835 (emphasis added). This extraordinary and apparently unlimited grant of delegating authority makes all more important a review by this Court of the rule fashioned by the Court of Appeals in this case.

We respectfully submit that it is time to halt the kind of activity so colorfully described by Senator Gaylord Nelson:

> The Corps of Engineers is like that marvelous little creature, the beaver, whose instinct tells him every fall to build a dam wherever he finds a trickle of water. But at least he has a purpose—to store up some food underwater and create a livable habitat for the long winter. Like the Corps, this little animal frequently builds dams he doesn't need, but at least he doesn't ask the taxpayer to foot the bill [See Atlantic Magazine article, *supra* n. 28 at 51.]

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IN THE

Supreme Court of the United States

October Term, 1970

No. 1316

2,606.84 ACRES OF LAND IN TARRANT
COUNTY, TEXAS, AND FRANK
CORN, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITIONERS' REPLY

The Brief for the United States in Opposition has been fully answered by the Petition except in one respect. The Government relies on the Act of December 22, 1944, c. 665, § 4, 58 Stat. 887, 889, for the proposition that at the time of the Benbrook Project, "it was already the established federal policy that recreational facilities be provided along with federally-constructed reservoirs" (p. 6).

Petitioners alluded to this Act in their Petition (p. 20 n. 34) but did not deal with it in detail because it seemed obvious that the Act did not establish any such federal policy as now claimed by the Government. In view of the Government's reliance on the Act, a few supplemental comments are in order.

1. The Committee Report cited in our Petition (p. 20 n. 34) affirmatively shows that the 1944 Act applied *only* to 42 dam and reservoir projects already owned by the Government. It therefore did not and could not apply to the Benbrook Project.

2. Section 4 of the 1944 Act granted the Corps of Engineers authority to construct, maintain and operate public park and recreational facilities only "in reservoir areas under the control of the War Department". The Benbrook Project was not "under the control of the War Department" in 1944.

3. Public Law 525 was enacted on the same day as Public Law 526, and yet one contained provisions for recreation and the other did not, showing Congress' clear intent to approve recreation only when specifically authorized. Public Law 14, which approved the Benbrook Project, contained no such authorization for recreation.

4. Subsequent Acts authorizing various projects specifically adopted certain provisions of Public Law 534. As only one example Public Law 858 (1948) states that "The provisions of Section 1 of the Act of December 22, 1944 (Public, Numbered 534, 78th Congress, 2nd Session) shall govern with respects to projects authorized in this title * * *". The incorporation by *express* reference of one provision of Public Law 534 negates the implied incorporation of any other provision of Public Law 534, including the one in Section 4 relating to recreation.

For each and all of these reasons, it is obvious that the 1944 Act alluded to by the Government simply is not relevant to the present inquiry.

The Government's argument in regard to the changes in the Benbrook Project overlooks an extremely important point. The Project was authorized by Public Law 14, in accordance with House Doc. 403, which allowed 30,000 feet of conservation storage. Without returning to Congress for approval, the Corps more than doubled the 30,000 feet to 72,000 feet. Another project, the Lavon Reservoir, was also authorized by Public Law 14, in accordance with House Doc. 533, which also allowed for conservation storage. Yet when the Corps sought to change the Lavon storage capacity, it felt compelled to return to Congress and obtain specific authorization in Section 2 of Public Law 525 (1946) for the Project to be "modified to provide for conservation storage as may be determined warranted by the Secretary of War upon the recommendations of the Chief of Engineers." Why the Corps would feel compelled to return to Congress in one instance and not in the other has not been and cannot be explained by the Government. The simple fact is that the many and substantial changes in the Benbrook Project were unauthorized in a situation clearly calling for prior authorization.

In conclusion, we should note that if the Court of Appeals theory now espoused by the Government is adopted—that so long as the completed project is somehow "associated with" the project sanctioned by Congress, no court can look behind it—there is literally no judicial review left for condemnations effected by the Corps of Engineers. We cannot believe that this Court, in *Berman* v. *Parker* or in any other case, ever meant to imply that since the project approved by Congress was a dam and reservoir in Texas, and since the completed project was "associated with" a dam and reservoir in Texas, the courts have no jurisdiction to test the taking.

It is noteworthy that the Government, like the Court of Appeals, does not challenge in any way the District Court's finding that the long-concealed purpose of the taking was for recreational purposes. The Government, like the Court of Appeals, has no explanation as to why, if it was "already the established federal policy" to provide recreational facilities along with federally constructed reservoirs, the Corps of Engineers fought so assiduously for so long to prevent anyone from learning about the recreational purpose behind the taking. If the recreational policy was so well established, why was the field practice of taking more property than needed so as to provide recreation specifically changed by the Secretary of the Army once the facts of this case came to light, and why did the head of the Corps of Engineers concede to a congressional committee that there was no authority for recreational taking? The Government suggests no answers and, we think, for obvious reasons.

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2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS, AND FRANK CORN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's opinion (Pet. App. 9a–41a) is reported at 309 F. Supp. 887. That court's Findings of Fact and Conclusions of Law and Additional Findings (Pet. App. 42a–72a, 79a–82a) are not reported. The opinion of the court of appeals (Pet. App. 85a–96a) is reported at 432 F. 2d 1286.

JURISDICTION

The judgment of the court of appeals (Pet. App. 97a) was entered on October 16, 1970, and a petition for rehearing was denied (Pet. App. 98a) on November 9, 1970. The petition for a writ of certiorari was filed on February 5, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, condemnation of certain lands was a permissible taking under the statute authorizing construction of the Benbrook Dam and Reservoir project.

STATUTE INVOLVED

The relevant provisions of the Act of March 2, 1945 are set forth in Pet. App. A 1a–5a.

STATEMENT

In 1945 Congress authorized construction of Benbrook Dam and Reservoir as follows (Act of March 2, 1945, c. 19, 59 Stat. 10, 18):

> The improvement of the Trinity River and tributaries, Texas, for navigation, flood control, and allied purposes is hereby approved and authorized in accordance with the reports contained in House Document Numbered 403, Seventy-seventh Congress * * *.

Pursuant to this authorization, the government in 1950 instituted condemnation proceedings to obtain the land needed for the project. Included in the property sought by the government were 1,207 acres owned by Sid W. Richardson. (Pet. App. E 86a.)

In his declaration of taking with respect to the Richardson property, the Secretary of the Army stated that the taking was required for public use "for the construction and operation of Benbrook

Dam and Reservoir on the Clear Fork of the Trinity River in Trinity River Basin, Texas." Richardson objected to the taking on the grounds that the proposed construction departed from the authorized project specifications and that portions of the land were earmarked for recreational use, a purpose not within the congressional authorization. (Pet. App. E 86a–87a.)

By agreement, the parties submitted to the district court (sitting without a jury) only the question of the government's right to take. The Court found that Richardson had waived his right to contest the taking of portions of his property, but sustained his claim as to the balance (some 647 acres), concluding that the taking of that portion was unauthorized for both of the reasons put forth by Richardson.[1] (Pet. App. B, 9a–41a; Pet. App. C, 42a–82a; Pet. App. D. 83a–84a.)

The court of appeals reversed (Pet. App. E 85a–96a). It noted (Pet. App. E 88a) that under well-settled doctrine "the judicial role in examining condemnation cases does not extend to determining whether the land sought is actually necessary for the * * * project." Instead a taking should be found to be "unauthorized" only if "no reasonable man could conclude that the land sought to be condemned had some association with the authorized project" (Pet. App. E 91a). As to Richardson's recreational purpose argument, the court concluded that there was no evidence from which a court could properly find that taking of the land in question was not authorized, and that in any event a taking for recreational development was an allied purpose within the statutory authorization (Pet. App. E 91a, 93a–94a). In rejecting Richardson's other contentions, the court held that the statutory authorization permitted deviations from the plans presented to Congress, that the modifications made during construction of the Benbrook project were proper, and that the project as built, and the condemnations with respect thereto, were authorized (Pet. App. E. 94a–96a).

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[1] Richardson died while the case was being litigated, and the representatives of his estate were substituted as parties. Pet. 4, n. 2.

ARGUMENT

1. Petitioners ask this Court to review again their contention that the taking was for recreational purposes and thus not within the statutory authorization for "navigation, flood control, and allied purposes" (Pet. 12–20).[2] The court below, however, limited its inquiry to whether the taking was associated with the Benbrook project and, finding no evidence to the contrary, upheld the taking.

This approach comports with this Court's admonition in *Berman* v. *Parker,* 348 U.S. 26, 35–36:

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[2] Petitioners' claims (Pet. 13–14) as to the significance of the issues here raised are not well-founded. The dramatic increase in federal lands between 1956 and 1970 shown by petitioners is due almost entirely to the perhaps inadvertent omission from the 1956 figures of Alaskan acreage. With Alaska included, the government in 1956 owned some 34.1 percent of all lands, not the 21.4 percent suggested by petitioners, as compared with 34.3 percent in 1970. See Report of the Director of the Bureau of Land Management, 1956, Statistical Appendix, p. 4, Table No. 3. Moreover, "less than 1 percent of the land now under Gov-

> * * * The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. * * *
>
> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. * * *[3]

Accord, *West, Inc.* v. *United States,* 374 F. 2d 218 (C.A. 5); *Wilson* v. *United States,* 350 F. 2d 901 (C.A. 10); *United States* v. *91.69 Acres of Land in Oconee County, South Carolina,* 334 F. 2d 229 (C.A. 4).

Petitioners rely on *Catlin* v. *United States,* 324 U.S. 229, for the proposition that the landowner is entitled to challenge the validity of the taking for departure from the purpose authorized by statute. But *Catlin* held only that the order there under review was not a final decision and was thus not appealable. And, as the court below noted (Pet. App. E 90a–91a), this Court's subsequent opinion in *Berman* clearly shows that the *Catlin* opinion "used the term 'purpose' in the sense of the overall project rather than in the sense

---

ernment ownership was obtained through purchase, condemnation, gift or exchange." *Public Land Statistics 1969*, U.S. Dept. of the Interior, p. 1.

[3] The Court in *Berman* of course recognized that Congress could not itself determine all the details of each condemnation and that the requisite discretion would necessarily extend to "Congress and its authorized agencies." See 348 U.S. at 34.

of some minor part of the project." The present taking is not at odds with the statutory purpose, in this broader sense, of the Benbrook project.[4]

Moreover, as the Fifth Circuit further held, even under petitioners' view the taking was authorized, since recreational development is an "allied" purpose within the statutory language. When Congress approved the Benbrook project, it was already the established federal policy that recreational facilities be provided along with federally-constructed reservoirs. See Act of December 22, 1944, c. 665, § 4, 58 Stat. 887, 889, set out at p. 9 *infra.*[5]

2. Nor is there merit in petitioners' claim that the Benbrook project as a whole was unauthorized because of the difference between the project as proposed and the project as actually built (Pet. 22–25). This contention is answered fully in the Fifth Circuit's opinion (Pet. App. E 94a–96a). As that court noted, Congress approved only a general, preliminary plan of the project; it intended that such modifications be made as later studies indicated were necessary.

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[4] Nor, as petitioners contend (Pet. 17–18), does the decision below conflict with that of any other court of appeals. In *Maiatico* v. *United States*, 302 F. 2d 880 (C.A. D.C.), the land sought was not within the area to which Congress had carefully limited the condemnation authority; by contrast, in the present case petitioners' attack goes to the *purpose* of the taking, and admittedly the *area* of taking involves broad discretionary authority. *Higginson* v. *United States*, 384 F. 2d 504 (C.A. 6), expressly noted that the right of the landowner to challenge the taking "as not being for the prescribed statutory purpose * * * is not in issue in the instant case * * *" (384 F. 2d at 507).

[5] It is immaterial that neither the declaration of taking nor the complaint cited this statute. See *United States* v. *Certain Land in Fairfax County, Virginia;* 345 U.S. 344, 347–348; *United States* v. *Catlin*, 204 F. 2d 661, 663 (C.A. 7).

This was in accord with long-standing congressional policy. See House Committee on Rivers and Harbors, H. Rep. No. 2165, 79th Cong., 2d Sess. 4 (1946).[6] And the changes that were actually made did not alter the area served or the project purposes.[7] In these circumstances the court below correctly held that the project as actually constructed was authorized.[8]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1971.

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[6] Contrary to petitioners' assertion (Pet. 24), 33 U.S.C. 701b–8 and 701m do not limit the authority of the Chief of Engineers, but rather grant him additional authority in certain circumstances where the statutory approval was incomplete. In the present case, the congressional authorization of the Benbrook project was sufficient for completion of construction without additional legislation.

[7] Moreover, Congress certainly was aware of the increased project costs which petitioners note (Pet. 23) and the changes from which they resulted, since it appropriated funds annually for the project's construction—thereby ratifying the modifications in design and location. See *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 293–294.

[8] Petitioners suggest (Pet. 21–22) that even under the limited review permitted by *Berman*, the Fifth Circuit should have found the taking here unauthorized. This contention goes essentially to the Fifth Circuit's weighing of the facts and circumstances of this case, and is not a matter warranting consideration by this Court.

APPENDIX

Act of Dec. 22, 1944, § 4, 58 Stat. 887, 889–890, provides:

> The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: *Provided,* That preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the public interest. The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be per-

mitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

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OCTOBER TERM, 1970

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2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS,
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v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING

Petitioners, Perry R. Bass, John B. Connally and Howell E. Smith, executors of the Estate of S. W. Richardson, Deceased (the original condemnee), respectfully pray that this Court grant rehearing of its Order of April 19, 1971, denying the Petition for Writ of Certiorari (39 U.S.L. Week 3453), and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case as prayed for in the Petition filed February 5, 1971, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Rehearing is called for by an opinion of this Court which was rendered on March 2, 1971—almost a month after our Petition was filed. In *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 39 U.S.L. Week, 4287

(No. 1066), the Court was dealing with a number of statutes, including The National Environmental Policy Act, but most particularly with the Department of Transportation Act of 1966 and with the Federal-Aid to Highway Act of 1968. The case involved a proposed six-lane highway through a public park in Memphis, Tennessee. The route through the park had been approved by the Bureau of Public Roads in 1956 and by the Federal Highway Administrator in 1966, and the acquisition of right-of-way had been approved by the Secretary of Transportation in 1967—all prior to the effective date of the Transportation and Federal-Aid statutes. These statutes required the Secretary to approve the proposed use of the parkland for a highway only where there were no feasible alternative routes or where feasible alternative routes involved uniquely difficult problems. Although the Secretary did approve the proposed use, he did not indicate the grounds for his decision. This Court said:

> Even though there is no *de novo* review in this case and the Secretary's approval of the route of I-40 does not have ultimately to meet the substantial evidence test, the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. * * * But that presumption is not to shield his action from a thorough, probing, in-depth review.
>
> The court is first required to decide whether the Secretary acted within the scope of his authority. * * * Also involved in this initial inquiry is a determination of whether on the facts the Secretary's decision can reasonably be said to be within the range [of choices he can make]. The reviewing court must consider whether the Secretary properly construed his authority to approve the use of parkland as limited to situations where

> there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems. And the reviewing court must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems.
>
> Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." * * * To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. * * *
>
> Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard. [Footnote deleted.]

We respectfully submit that there is no possible way to square the holding and the Court's language in *Overton Park* with the holding and language of the Fifth Circuit in the instant case. Obviously, there would be no point in the "thorough, probing, in-depth review" of whether the Secretary acted within the scope of his authority in *Overton Park* unless the grounds chosen by the Secretary for his decision were relevant. Although the statutes in the two cases are different as to the *standards* to be applied by the appropriate official, the scope of authority to act is the same under both statutes. Moreover, the Court ordered an inquiry into whether the Secretary "acted within the scope of his authority," whether he "properly construed his authority," whether his grounds were reasonable, whether his decision "was based on a consideration of the relevant factors," and whether there was "a clear error of judgment." Again, such an inquiry would be meaningless if the Secretary could, without challenge, state one ground for his decision when in fact his real ground, intent and purpose were entirely different.

In the instant case, despite uncontradicted evidence in the record and uncontested findings by the District Court that the Secretary of the Army and the Corps of Engineers intended the area above el. 697.1 to be taken for recreational purposes and deliberately kept this purpose secret,[1] the Fifth Circuit refused to "substitute its judgment for that of the Corps of Engineers" (App. to Petition, p. 92a). The Fifth Circuit said:

---

[1] Compare *United States* v. *0.01 Acre of Land,* 310 F. Supp. 1379, 1386 (D. Md. 1970), where the court approved the taking only because there was "no inconsistency between the proposed use of the property and the authority for the taking, as set forth in the complaint and the Declaration of Taking, and the actual use which the Government intends to make of the property." See also *United States* v. *327 Acres of Land,* 320 F. Supp. 844, 848 (N.D. Ga. 1971), where the court, in considering the issue of enhanced value, held that "the taking of these tracts was not included in the public project from the beginning and the lands were not 'probably within the scope of the project from the time the Government was committed to it.'" Finally, see *Town of Brookline* v. *Metropolitan District Commission,* 258 N.E. 2d 284 (Mass. 1970), in which the court was considering a park in Brookline and issued an injunction against a proposed use. The court said: "The principle that land appropriated to one public use cannot be diverted to another inconsistent use without plain and explicit legislation to that end has been well established in our decisions."

> The court should not and may not interfere with the exercise of the discretion given to these experts [of the Corps of Engineers]. We therefore conclude that it was beyond the judicial power of the district court to inquire into the necessity for taking the area above elevation 697.1. Consequently, the court could not use its finding of non-necessity to support its ultimate conclusion that the taking was solely for recreational purposes and therefore unauthorized. [*Ibid.*]

Surely the Secretary of Transportation is as much an expert on highways as the Corps of Engineers is on recreational areas. Yet this Court in *Overton Park* did not feel compelled to defer to the Secretary's announced approval of the highway; it ordered the District Court to go behind that approval and make a "thorough, probing, in-depth review" of the basis of the approval. That case calls for reversal in this one.

2. A second reason why rehearing should be granted is that this Court has granted certiorari in a case which raises questions directly bearing on the outcome of the instant case. This Court granted certiorari in *Sierra Club* v. *Hickel,* Oct. Term 1970 No. 939, on February 3, 1971 (39 U.S.L. Week 3359), two days before our own Petition was filed. Questions 5, 6 and 9 in that case read:

> 5. May the Secretary of the Interior authorize others to construct a major connecting link highway across Sequoia National Park for a non-park purpose?
>
> 6. May a statute requiring Congressional approval of any transmission line located in Sequoia National Park be ignored by the Secretary of the Interior?

> 9. May the Secretary of Agriculture authorize a huge private resort development in a national game refuge without first finding the proposed use consistent with the mandate of Congress in creating the refuge?

As the Ninth Circuit put it in that case:

> On the merits, the Sierra Club contends that the Secretary of Agriculture who has the responsibility under Congress for management of the national forests has exceeded his authority and has acted illegally as well as arbitrarily and capriciously in approving the master plan proposed by Disney. [433 F.2d at 27.]

A decision on the merits by this Court in favor of the Sierra Club would almost certainly affect the disposition of the instant case, and yet if rehearing is not granted here, the case may be mooted by the action of the Corps of Engineers in relation to the property under consideration.

3. There is still another reason why rehearing should be granted. Our Petition was directed to the unconstitutional taking of petitioners' land, in view of the fact that the real purpose of the taking (for recreational use) was hidden, and the project as built was so radically different from the one authorized by Congress as to amount to an unauthorized project. It would have been inappropriate to argue in that Petition that the project was a proper one under the Constitution but nevertheless required a statement from the Secretary of the Army with respect to the environmental impact involved. In his dissent to the denial of the Petition,[2] however, Mr. Justice Douglas correctly

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[2] See also the dissenting opinions of Justices Black, Douglas and Brennan from the denial of certiorari in *Antonio Conservation Society* v. *Texas Highway Dept.*, Oct. Term 1970, No. 1101, 39 U.S.L. Week 3269, December 21, 1970.

pointed out that The National Environmental Policy Act, 42 U.S.C. § 4331, "requires environmental impact statements for proposed projects. So far as we are advised, no such statement has been filed" (footnote deleted). The Justice is correct. Work will soon begin on the recreational portion of petitioner's land, and yet no statement has been filed, although clearly required by the Act.

The force and effect of this Act are demonstrated by *Zabel* v. *Tabb,* 430 F.2d 199 (5th Cir. 1970), in which this Court denied certiorari on February 22, 1971 (39 U.S.L. Week 3360, No. 955), over two weeks after our Petition was filed. In *Zabel,* the Secretary of the Army "and his functionary, the Chief of Engineers," denied a permit to fill in eleven acres of tidelands in Boca Ciega Bay, Florida, for use as a commercial mobile trailer park. The denial was based on potential damage to the ecology. The Court of Appeals reversed a District Court order that the permit be granted. In relying strongly on The National Environmental Policy Act, the court said:

> Although this Congressional command was not in existence at the time the permit in question was denied, the correctness of that decision must be determined by the applicable standards of today. The national policy is set forth in plain terms in § 101 and the disclaimer of § 104(3) neither affects it nor the duty of all departments to consider, consult, collaborate and conclude. For we hold that while it is still the action of the Secretary of the Army on the recommendation of the Chief of Engineers, the Army must consult with, consider and receive, and then evaluate the recommendations of all of these other agencies articulately on all these environmental factors. In rejecting a permit on non-navigational grounds, the Secretary of the

> Army does not abdicate his sole ultimate responsibility and authority. Rather in weighing the application, the Secretary of the Army is acting under a Congressional mandate to collaborate and consider all of these factors. [199 F.2d at 213; footnote deleted.]

There can be no question but that the Act applies to all projects, regardless of when initiated. In *Environmental Defense Fund, Inc.* v. *Corps of Engineers,* E.D. Ark., No. LR-70-203, February 19, 1971, for example, the court held the Act applicable to a project two-thirds completed, pointing out that Congress intended for the Corps "to objectively evaluate all of their projects, regardless of how much money has already been spent thereon and regardless of the degree of completion of the work."[3]

As the court in that case noted, a memorandum from Deputy Secretary of Defense David Packard, dated August 8, 1970, directed to the Secretary of the Army, entitled, "Interim Guidelines on Environmental Statements," stated in part:

> e. Projects or Programs Initiated Before January 1, 1970.—Consistent with the above guidelines, an environmental statement shall be filed on actions significantly adversely affecting the quality of the environment even though the actions arise from projects or programs initiated prior to the enactment of the NEPA on January 1, 1970. Where it is not practicable to reassess the basic course of action, further incremental major actions should take into account environmental consequences not fully evaluated at the outset of this project or program.

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[3] Earlier cases holding to the contrary are *Brooks* v. *Volpe,* W.D. Wash., No. 9144, September 25, 1970; *Investment Syndicates, Inc.* v. *Richmond,* 318 F. Supp. 1038 (D. Ore. 1970).

Similarly, the Guidelines as finally published in the Federal Register only last month provide:

> 11. Application of section 102(2)(C) procedure to existing projects and programs. To the maximum extent practicable the section 102(2)(C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of envorinmental consequences not fully evaluated at the outset of the project or program. ["Statements on Proposed Federal Actions Affecting the Environment", 36 Fed. Reg. 7724, 7727 Par. 11 (1971).]

Another recent and important case along similar lines is ***Environmental Defense Fund* v. *Corps of Engineers,*** D.D.C., Civ. No. 2655-69, January 21, 1971, in which the District Court for the District of Columbia issued a preliminary injunction restraining the continued construction of the Cross-Florida Barge Canal. Plaintiffs' claim was that the Canal, although duly authorized was being constructed in violation of a number of statutes, including The National Environmental Policy Act. In granting the injunction, the court rejected the Government's contention that the Act did not apply to the Canal (authorized in 1942 and begun in 1964), and stated:

> The NEPA recognizes a "continuing responsibility of the Federal Government" to strive to preserve and enhance the environment, and requires a detailed and systematic impact of Federal actions.

And in *Texas Committee on Natural Resources* v. *United States,* W.D. Tex., No. A-69-CA-119, February 5, 1970, the court held the Act to have retroactive application.

Only by a grant of rehearing can the Corps of Engineers be prevented from proceeding with a project which most assuredly will have a substantial ecological impact but as to which no ecological consideration has been given, as required by law.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Certification

This is to certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that the Petition is restricted to the grounds numbered 1-3 in said Petition, which are confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioners although not previously presented.

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